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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 56

THE ATLANTIC REFINING COMPANY, OWNER OF THE TANK STEAMSHIP "BOHEMIAN CLUB", PETITIONER,

vs.

A. P. MOLLER, CLAIMANT OF THE MOTOR-VESSEL "LAURA MAERSK"

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 29, 1943.

CERTIORARI GRANTED JUNE 1, 1943.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT

Appendix to Appellee's Brief

EXCERPTS FROM NOTES OF TESTIMONY

HENRY EUGENE ROWE, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wolff:

Q. Captain, on December 20, 1939, were you the master of the tank "Bohemian Club"?

A. Yes, sir.

Q. And am I correct in saying on that day she was bound on a voyage from Atreco, Texas, to Point Breeze, Philadelphia?

A. Yes, sir.

* * * * * * *

Q. Approximately where were you about 7:00 A. M. on that morning?

A. I had just passed Reedy Island about 7:00 A. M. or a little before that time.

Q. Did you continue up the stream?

A. Yes, sir.

Q. Until when?

A. Until 7:41 A. M., when I anchored on the Bulkhead Range in a dense fog.

* * * * * * *

Q. You say you anchored on account of a dense fog. I want you to tell us, Captain, how much visibility you had.

A. There was no visibility when I anchored. Therefore, it wasn't safe to navigate any further.

Q. You didn't deem it safe to continue to navigate?

A. That's correct, sir.

Q. Do you recall whether or not any other vessel proceeded up the river ahead of you?

[fol. 2] A. Yes, the "Gulfpride" had proceeded ahead of me.

Q. Did you lose sight of her at any time?

A. I lost sight of her on the Bulkhead Shoal Range in the fog.

Q. Had the "Gulfpride" been blowing any signals?

A. The first signal I heard was three whistles, which signified his engines were going full astern.

Q. Where were you at that time?

A. I was just turning on the Bulkhead Range.

Q. When you heard these three blasts from the "Gulfpride" which indicated to you she was putting her engines full speed astern, was she visible?

A. No.

Q. Did that have anything to do with your anchoring where you did?

A. Yes, that was another reason why it wasn't safe to navigate because he was—that signified he was going full astern getting ready to anchor.

Q. About how far ahead of you was the "Gulfpride" when you last saw her, just before the fog shut her out?

A. About a half a mile.

Q. When you anchored, Captain, were you able to see any of the channel buoys or channel markings?

A. No, sir.

Q. Where were you at the time that you anchored?

A. On the bridge.

Q. How long did you remain at the point where you anchored at 7:41?

A. I laid there until 10:15, about.

Q. What did you do then? What happened at 10:15? That is 10:15 A. M.

A. Yes. At that time I could see the 2-D Buoy close, about 150 feet away, and I decided to shift the ship.

Q. You say you saw Buoy 2-D 150 feet away, in which direction?

A. About 45 degrees on the starboard bow.

. . . . . .

[fol. 3] Q. What did you do about 10:15, Captain, in the way of changing your position?

. . . . . .

A. Put the engines on stand by, hove up the starboard anchor, put the engines half-speed ahead, my rudder to starboard to counteract the set of the current——

Q. The tide was running out [how,] flood or ebb?

A. The tide was ebb, which tended to send me to the southwestward in the center of the channel.

Q. And you had had your starboard anchor down?

A. I had had my starboard anchor down.

Q. Just your starboard anchor?

A. Starboard anchor.

. . . . . .

Q. Approximately when did the tide change from ebb to flood?

A. About three hours later.

Q. And you shifted your position to a point further down the stream?

A. Further down, yes, sir.

Q. For what purpose?

A. In order to clear the 2-D Buoy when the tide changed.

Q. What was the purpose of putting your engines half-speed ahead and your rudder to the right after lifting your starboard anchor and before you dropped it?

A. To hold the ship's head up and counteract the set of the ebb tide in order that my bow wouldn't fall into the center of the channel.

Q. How fast was the current, do you know?

A. About a knot and a half.

. . . . . .

Q. Your fog bell, you say, is located where?

A. On the forecastle head.

Q. Was it being sounded?

A. Yes, sir, every minute.

[fol. 4] Q. How frequently?

A. Every minute.

Q. What kind of a sound——

A. Rapid ringing of the ship's bell for about five seconds.

Q. And that you say was done every minute?

A. Yes, sir.

Q. Through the entire time you remained anchored?

A. Yes.

Q. Up until the time this collision occurred?

A. Yes.

Q. What was your vessel drawing fore and aft?
A. 27 feet 1 inch aft and 27 feet forward.

. . . . . .

Q. What was her length?
A. 435 over all.
Q. Were you loaded or light?
A. Loaded with a full cargo of crude oil in the bulk.
Q. What were the weather conditions when you shifted your position at about 10:15 that morning?
A. The fog had cleared slightly, the visibility was about 200 feet, and then shut in again.
Q. What were the prevailing conditions up until the time of this collision?
A. Foggy, with rain, wind southeast, what there was of it.
Q. The collision occurred at approximately what time?
A. About 11:36 A. M.
Q. Did you at any time up until the moment of this collision deem it safe to proceed ahead?
A. No, sir, at no time.

. . . . . .

Q. Would it have been possible for you to have safely anchored outside the channel, outside the entrance of the Bulkhead Range?
A. No.

. . . . . .

[fol. 5] Q. What chances would you have taken had you anchored anywhere outside the channel limits on the bulkhead range?
A. Chances of grounding my ship.

. . . . . .

Q. Now, Captain, where was your nearest anchorage above the point where you anchored?
A. Above the point?
Q. Yes.
A. About four miles.
Q. Where was it?
A. At Deepwater Point.

. . . . . .

Q. Captain, where was the nearest point below the bulkhead range where there was anchorage in the Delaware River?

A. Reedy Island.

Q. What time did you pass Reedy Island?

A. 6:52 A. M.

Q. What were the weather conditions then?

A. Suitable for navigating.

Q. Was there a fog?

A. No, no fog.

Q. Now, Captain, what was the first intimation you had of the presence of the "Laura Maersk"?

A. When I first seen her coming through the fog.

Q. What time was that?

A. That was about 11:35 or a little less.

Q. Can you give us an estimate as to how far distant she was when you first saw her?

A. About 400 feet from where I was on the bridge.

Q. How much of the vessel was visible at that time?

A. Just the bow.

. . . . . .

Q. The rest of the ship, you say, was enveloped in the fog?

[fol. 6] A. Yes.

Q. How was she headed?

A. She was headed about—it appeared to be about five degrees on the port bow as near as I could tell.

Q. Was she coming towards you?

A. Coming towards me.

Q. What did you do?

A. At that time I sounded the general alarm.

Q. What is the general alarm?

A. It called all members of the crew to their stations.

Q. The general alarm, then, as I understand it, is an alarm to the men on your ship?

A. Yes, sir.

. . . . . .

Q. What else did you do?

A. Put the engines full astern.

Q. What was the purpose of that?

A. To try and get away from her to ease the impact; there wasn't time to pay out any chain on the anchor.

Q. I was going to ask you that question. Did you pay out any more anchor chain?

A. No, sir.

Q. Would it have been possible for you to have done that?

A. No, sir.

Q. Why?

A. Not distance [time] enough from the time she appeared until the collision.

Q. What else, if anything, did you do?

A. I blowed a series of danger signals to warn the men on the other ship of danger.

Q. You blew those danger signals on the "Bohemian Club's" whistle, I suppose?

A. Yes.

Q. How many times did you blow it?

A. 8 or 10 times.

Q. You mean 8 or 10 blasts?

[fol. 7] A. Yes.

Q. What was the purpose of doing that?

A. To warn the other men on the other ship they were in danger.

Q. Was there anything else you could have done to avoid this collision?

A. Not a thing.

* * * * * * *

Q. Now, Captain, until the time this collision occurred you have already told us the tide was ebbing?

A. Yes, sir.

Q. How was the wind?

A. The wind was light to moderate southeast with occasional light rains.

Q. Was there any change in the wind at any time?

A. The wind shifted to the westward position about the time the "Maersk" collided with me.

Q. Just about the time the "Laura Maersk" collided with your ship?

A. Yes.

Q. It shifted from the west?

A. It shifted from out of the west.

Q. And what effect did that have upon the fog, if any?

A. It blowed it away, cleared it off.

* * * * * * *

Q. Now, Captain, while you were at anchor did you hear any fog signals from any other vessels during the course of the morning?

A. I heard ship's bells astern of me.

Q. Astern of you?

A. Yes, sir.

Q. Were you able to see those ships?

A. No, sir.

Q. Did any vessels pass you while you were at anchor, at any time from 7:41 that morning until the time of this collision, either up or down the river?

A. Yes, sir.

[fol. 8] Q. Can you tell us what vessels passed you, and approximately what time?

A. The "White Flash" or the "Franklin" passed about 9:45 and the other one around 10:00.

* * * * * * *

Q. How far off were they when they passed you?

A. I should say about 200 feet.

Q. Do you recall any other vessel having passed?

A. Yes, there was a Finnish ship went by.

Q. About what time was that?

A. That was between the time the "White Flash" went down and the "Franklin".

Q. And how far off, approximately, was she when she passed?

A. She was about the same distance, in the range of visibility.

Q. That is about 200 feet?

A. Yes.

Q. On which side did the "White Flash," the "Franklin," and the Finnish ship pass you?

A. On my port side, all of them upon the right-hand side of the channel, going down.

Q. They passed you on your port side?

A. Yes, sir.

Q. And you were headed upstream?

A. I was headed up.

Q. Did any other vessels pass you at any time from then until the collision occurred?

A. No, sir.

Q. When they passed you, you said the visibility was about what?

A. About 200 feet.

* * * * * * *

Cross-examination.

By Mr. La Brum:

Q. Captain, what licenses do you hold?

A. Master's license.

[fol. 9] Q. A master's license; is that of all oceans?

A. All oceans, any tonnage, yes, sir.

Q. Have you a pilot's license?

A. Yes, sir, first class pilot's license.

Q. For what tributaries?

A. Delaware Bay and River to Philadelphia.

Q. As you proceeded up the Delaware River you were acting as pilot, were you?

A. Yes, sir.

Q. And as such, of course, as a licensed pilot of the Delaware River, you are thoroughly familiar with the ranges and the range lights?

A. After 16 years, yes, sir.

* * * * * * *

Q. When did you leave the breakwater?

A. The night before.

Q. What time?

A. I don't remember that.

Q. Was it clear then?

A. Yes.

Q. Did you proceed up the river after reaching the breakwater?

A. I proceeded as far as Liston Range.

Q. What happened there?

A. In the fog, and I anchored again.

Q. What time was that?

* * * * * * *

Q. Now, you may consult your log to answer that. What time was it

A. 9:46 P. M.

* * * * * * *

Q. How long did you remain at Liston Range?
A. Until 4:58 A. M., the next morning.
Q. 4:58 A. M., the next morning?
A. Yes.
[fol. 10] Q. Then what did you do?
A. Proceeded up the river.

. . . . . .

Q. When did you first pick up the "Gulfpride"?
A. At daylight.
Q. How far ahead of you was she at that time?
A. About a mile.

. . . . . .

Q. When did daylight break on that day, if you recall? Approximately what time?
A. About 7:15, I judge.

. . . . . .

Q. And you could see her a mile ahead at 7:15, and when did you first lose her? How long after you picked her up did you lose her?
A. Well, I lost her at 7:41 when we went into the fog.

. . . . . .

Q. And you lost it because the "Gulfpride" went into a blanket of fog?
A. That is when I anchored. I ran into the fog at the same time.
Q. And you ran in right back of her?
A. Yes.
Q. He entered the fog first, didn't he?
A. Yes.
Q. He remained a half a mile or a mile ahead of you all the way up the river, did he not?
A. About that.

. . . . . .

Q. What anchor did you let go?
A. The starboard anchor.
Q. How were you heading?

. . . . . .

A. About 9 degrees.

Q. You were heading up the river, weren't you?

[fol. 11] A. Yes.

Q. How was the tide?

A. The tide was ebbing.

Q. Had it just begun to ebb or had it been ebbing for some time?

A. It had been ebbing for some time.

• • • • • • •

Q. What was your visibility at the time you dropped your anchor?

A. None.

Q. No visibility at all?

A. No visibility at all.

Q. Could you see the bow?

A. I could see the bow but faintly.

Q. And how long did it remain that way?

A. All morning.

Q. From 7:41 until when?

A. Until about 10:00 o'clock, and then it lightened up somewhat. That is when I shifted anchorage.

• • • • • • •

Q. And what did you do at that time?

A. I got ready to shift the ship away from 2-D in order that I wouldn't foul the——

Q. What made you decide to slip the ship away from 2-D?

A. When the tide started to flood——

Q. When the tide started to what?

A. When the tide started to flood, there was a possibility that I would swing around and foul the buoy.

• • • • • • •

Q. Now, you say it cleared up about 10:00 o'clock?

A. No, it didn't clear up, it lightened up.

• • • • • • •

[fol. 12] Q. Through your familiarity with the tide tables you knew at least two hours, possibly three hours would pass before you would have flood tide, is that correct?

A. That is correct.

• • • • • • •

Q. Now, you stated in your examination yesterday that when it cleared at 10:00 o'clock in the morning you hove up your anchor and changed your position so as not to foul the buoy. How did you change that position?

* * * * * * *

The Witness: I hove up the anchor, put the rudder hard right, engines half ahead in order to overcome the set of the current, hold the ship's bow up so I could keep my ship in the position she was to the eastward of the channel, the tide tending to set the ship off into the channel to the southwestward.

By Mr. La Brum:

Q. What was the position of the ship after you had dropped your anchor?

A. I didn't know that until after the collision.

* * * * * * *

Q. How did your ship head when you dropped your anchor after the maneuver at 10:00 o'clock in the morning or shortly thereafter?

A. About 30 degrees.

Q. How far off the buoy were you at that time?

A. I don't know.

Q. Do you know how far backward you moved?

A. No, I don't know.

Q. Why did you move at all?

A. In order to clear the buoy.

* * * * * * *

Q. I believe you said you drifted about 3 minutes, is that correct?

* * * * * * *

[fol. 13] The Witness: My engines were half ahead for two minutes.

By Mr. La Brum:

Q. Half ahead for two minutes, yes; what is the next entry?

A. Let go the starboard anchor 10:18, 3 minutes later.

Q. So, you were drifting with the current about 3 minutes?

A. I was free with the tide.

Q. About three minutes?

A. About three minutes.

Q. How fast was the tide?

A. About a knot and a half.

. . . . . .

Q. That is correct. What anchors did you have down?

A. Starboard anchor.

Q. Just the one starboard anchor?

A. Right.

Q. How much chain did you have out?

A. Thirty fathom.

. . . . . .

Q. How many feet is thirty fathom?

A. 180.

. . . . . .

A. With 30 fathom of chain out, or 45 fathom of chain, whatever you use for an anchorage, there is always a heavy bight in the chain, the chain hangs on a curve or a bight, and what difference that would make on the length or the distance between the bow and the anchor I can't figure that. The chain isn't stretched taut. That would be next to impossible, considering the weight of the anchor.

Q. What was the depth of the water in this specific instance?

A. The channel is 35 feet.

. . . . . .

[fol. 14] Q. When you took up the anchor at 10:13 did you continue to ring your fog bell?

A. No.

Q. What did you do then?

A. Blowed the whistle, the fog whistle.

Q. How often did you blow the fog whistle?

A. I blew it once or twice.

Q. Once or twice?

A. Yes.

Q. During the period that your anchor was up?

A. That's right.

Q. When did you commence ringing your fog bell thereafter?

A. When I dropped the anchor again at 10:18.

. . . . . .

Q. You didn't know the depths of the water surrounding the channel, but I think you did say yesterday that you couldn't anchor any other place than where you were because you were afraid of going aground; is that correct?

A. That's correct.

. . . . . .

Q. . . . Captain, shortly before ten o'clock, after you had anchored—or shortly after ten o'clock, or let's fix it at eleven o'clock, after you had anchored in the position that you indicated to us, where were you in relation to the ship?

A. I was in the pilot house.

. . . . . .

Q. Where were you immediately preceding the collision between the "Laura Maersk" and the——

A. In the pilot house standing alongside the engine room telegraph and immediately behind the ship's whistle.

. . . . . .

Q. Who else was on the bridge at the time?

A. The third mate.

[fol. 15] Q. The third mate; what was his name?

A. Hamann.

. . . . . .

Q. Were you the first one to see the "Laura Maersk"?

A. I believe the third mate and I saw it at the same time.

. . . . . .

Q. Just describe what you did and what he did, if you know, at the time you both saw the "Laura Maersk".

A. When we seen the "Laura Maersk" the third mate throwed in the switch on the electric alarm bells, I put the engine full astern and blew the danger signal.

. . . . . .

Q. Was there a break or rift in the fog at that time?

A. At the time of the collision?

Q. Yes.

A. It was lifting then.

Q. Had it shown any signs of lifting just prior to the collision?

A. No, sir.

Q. How soon after the collision did it clear?

A. Several minutes.

Q. But it was lifting at the time?

A. It was lifting at the time, but hadn't lifted sufficiently to open up the visibility.

* * * * * * *

Q. How was the wind blowing immediately preceding the collision and at the time of the collision?

A. The wind had shifted to the westward at about the time of the collision.

* * * * * * *

Q. From the westward was it stronger than the wind from the south southeast?

A. Yes, sir.

Q. Did you hear any signals of any kind just prior to this collision?

[fol. 16] A. No, sir.

Q. Your ears are good, Captain, are they?

A. Yes, sir.

Q. Could you have heard if there had been a whistle blown?

A. Yes, sir.

Q. Did you hear any other fog signals at or about, just prior to or, at or about the time of the collision?

A. Ships below me were ringing the fog bells.

Q. Did you hear any fog whistles at all?

A. No, sir.

* * * * * * *

Q. How many blasts did you blow on your whistle?

A. Eight or ten, as near as I can remember.

Q. Were they in quick succession?

A. Quick succession.

Q. What did they indicate?

A. I wanted to draw the attention of the approaching ship, to the men on the approaching ship that they were getting into danger.

• • • • • • • •

Q. I believe you said yesterday in direct examination that there was a quartermaster on the forecastle head.

A. Yes, sir.

Q. And what were his duties?

A. His duties were to keep a lookout, ring the fog signal on the forecastle head.

Q. Did he comply with those duties, to the best of your knowledge?

A. He did.

Q. And how often, to your knowledge, did he give any signals?

A. Once a minute.

Q. Once every minute?

A. Yes.

Q. How long did he ring?

A. Five or six seconds.

• • • • • • • •

[fol. 17] Q. Now, Captain, all ships which passed you, including the "White Flash," the "Franklin" and the Finnish ship, passed you prior to making the change in position, did they not?

A. Yes.

Q. And they were about 200 feet off your port bow?

A. That's right.

Q. Nothing else passed you after that between 10:18 and the time of the collision?

A. No.

• • • • • • • •

Redirect examination.

By Mr. Wolff:

• • • • • • • •

Q. Now, Captain, what is the course on the Bulkhead Range?

A. Bound up?

Q. Bound up the Bulkhead Bar Rrange.

A. Bound up the course is 9 true.

Q. 9 degrees true?

A. Right.

Q. You say that while you were anchored you were headed on 30 degrees?

A. About 30 degrees.

Q. Was that true or magnetic?

A. True.

Q. You were at an angle, then, of approximately 21 degrees with the course on the Bulkhead Bar Range?

A. Right.

* * * * * * * *

Q. Captain, tell us exactly what your purpose was in putting your engines half speed astern and your rudder over to the right when you lifted your starboard anchor shortly after ten o'clock.

A. Half speed ahead, you mean?

Q. Yes, half speed ahead. What was your purpose in putting your engines half speed ahead and putting your [fol. 18] rudder to the right when you lifted your anchor shortly after ten o'clock?

* * * * * * * *

A. To overcome the set of the tide and keep my ship in the east side of the channel, keep her head from falling off into the channel.

Q. If you hadn't done that, what effect upon the heading of your ship would the set of the tide have had?

A. The set of the tide would have thrown my bow off first to the center of the channel or to the westward. In order to overcome that I had to put the wheel, the rudder hard right, and the engines half ahead to hold my ship in position.

Q. Now, did you get headway on your ship?

A. Sufficient to overcome the strength of the tide.

Q. Look at your log and tell me when your engines were stopped.

A. At what time?

Q. What time did you stop your engines?

A. 10:15.

Q. 10:15, and what time did you drop your starboard anchor?

A. At 10:18.

Q. And those two entries, I understand, do not take into account the split minutes?

A. No, sir.

• • • • • • •

Q. When you dropped the anchor at 10:18 could you see Buoy 2-D?

A. No, sir.

Q. When did you first see it afterwards?

A. After the collision.

• • • • • • •

Q. How long have you been master of the "Bohemian Club"?

A. For 16 years.

[fol. 19] Q. During all of that time have you been navigating up and down the Delaware River?

A. Yes.

• • • • • • •

Q. Would you have considered it safe at any time to navigate the "Bohemian Club" with a full load outside the channel limits?

A. No.

• • • • • • •

Q. What danger, if any, would you have encountered had you ever at any time navigated your ship outside the channel limits?

A. Possibility of running aground.

• • • • • • •

Q. Look at your log, Captain, and tell me when you took the bearings on Finn's Point and Pea Patch Light?

• • • • • • •

Q. Read that whole sentence.

A. "At 11:45 A. M. the wind shifted to the westward, clearing weather, the "Laura Maersk" backed off and proceeded without hailing. After weather cleared, bearings

were Finn's Point Jetty Light bore 79½ degrees true, Pea Patch Island Dike middle light bore 325½ true."

Q. Are we to understand that those bearings of Finn's Point and Pea Patch Island were taken some time after 11:45 A. M.?

A. Yes, sir, about that time.

Q. What was the time of the collision?

A. 11:36.

Q. What kind of a blow was this when the "Laura Maersk" hit you?

A. A heavy blow.

Q. Did it change the heading of your ship?

A. I couldn't say.

* * * * * * *

[fol. 20] Recross-examination.

By Mr. La Brum:

Q. Now, Captain, just a few questions and then I will be finished with you. I think you testified that at the time you saw the "Laura Maersk" you ordered your engines full speed astern; is that correct?

A. That's what I rung on the telegraph.

Q. Do you know whether your engines went full speed astern? Did you get an answer to your telegraph?

A. I got an answer, yes, but it would take——

Q. That would indicate the engines were going full speed astern, is that correct?

A. That would indicate that he did turn them full speed astern, yes.

Q. Did you make any way through the water?

A. No, sir.

Q. Do you know whether or not the engines did go full speed astern?

A. Yes, I believe they did. He turned them over, any way; whether he got the speed up or not, I couldn't say.

Q. Did you make any attempt to surge the anchor chain?

A. No, it wasn't time.

* * * * * * *

Redirect examination.

By Mr. Wolff:

* * * * * * *

Q. Yes. How soon after the collision did you see the Buoy 2-D?

A. Oh, within five minutes.

Q. Didn't you say the fog lifted at about the time of the collision?

A. At the time of the collision the fog was lifting.

Q. And the Buoy 2-D became visible then?

A. Shortly afterward.

* * * * * * *

[fol. 21] THORVALD J. NORDSKOG, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wolff:

Q. Now, Captain, what was your employment on December 20, 1939?

A. I was captain of the motor ship "Franklin".

* * * * * * *

Q. Was the "Franklin" proceeding down the river that morning?

A. Yes.

* * * * * * *

Q. Do you recall having passed the "Bohemian Club"?

A. Yes, sir.

Q. At about what time, approximately?

A. About 9:45, I think.

Q. A. M. or P. M.?

A. A. M.

Q. What were the weather conditions at that time?

A. At the time I passed——

Q. The "Bohemian Club".

A. The visibility was about 200 feet.

Q. Why did you have visibility of only about 200 feet? What were the conditions?

A. It was sort of a—I was looking for an anchorage.

Q. No. Why did you have a visibility of only about 200 feet? What was the weather like? You say you had only 200 feet visibility.

A. Dense fog.

Q. Did you hear any signals from the "Bohemian Club" as you passed her?

A. I heard a fog bell ringing.

* * * * * * *

Q. Why did you drop the anchor?

A. Because it was too foggy to run.

[fol. 22] Q. And where did you anchor with respect to Buoy 2-B?

A. About a quarter of a mile to the southeast of 2-B.

* * * * * * *

Q. Was there any place for you to anchor below 2-D above the point where you did anchor?

A. No, not the way the condition was, because there were ships anchored around there.

Q. How did you know there were ships anchored around there?

A. I could hear the bells, several bells.

Q. Could you see the ships?

A. I seen the dredge "Delaware" anchored a little below 2-B.

Q. While you were going down the Bulkhead Bar Range, that is from Buoy 2-D to Buoy 2-B, did you hear the ships' bells?

A. Yes, sir.

Q. Where did you locate them?

A. On my port bow.

Q. Ahead of you?

A. Yes.

Q. Is that the reason why you didn't anchor on the Bulkhead Bar Range?

A. Yes, sir.

Q. Captain, you anchored there at about what time?

A. About 10:05.

Q. How long did you remain at anchor?

A. Until 11:40.

Q. What were the weather conditions up until 11:40?

A. Dense fog.

Q. Could you see the "Bohemian Club?"

A. No, sir.

Q. Could you hear fog bells from any vessels in the vicinity?

A. I did.

[fol. 23] Q. Do you know from how many vessels you were able to hear fog bells?

A. No, I couldn't say how many.

Q. Were there more than one?

A. Yes, several.

* * * * * * *

Q. Did you see this collision between the "Bohemian Club" and the "Laura Maersk"?

A. I did not.

Q. Were you aware at the time that a collision had occurred?

A. I was on my way to the bridge?

* * * * * * *

Q. And then what happened while you were on your way up to the bridge?

A. I heard a crash.

* * * * * * *

Q. Did you look around?

A. I did.

Q. What did you see?

A. I saw the "Laura Maersk" backing away from the "Bohemian Club".

Q. What was the weather like at that time?

A. It had cleared up.

Q. Had there been any change in the wind?

A. Yes, the wind had changed, coming from the west ward.

Q. You mean the wind was coming from the westward after it had changed?

A. Yes, sir.

Q. And what effect did that have upon the fog?

A. The fog was blowed away from the channel.

* * * * * * *

Q. Captain, when you passed the "Bohemian Club," in your opinion, would it have been safe for her to have continued her navigation up the Delaware River?

[fol. 24] A. No, sir.

Q. Why not?

A. Because the fog was too thick.

Q. By the way, what is the draft of your vessel?
A. Nine foot six.

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Cross-examination.

By Mr. La Brum:

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Q. I believe you said you passed the "Bohemian Club" at 9:45, is that correct?
A. That's right.

• • • • • • •

Q. What was the visibility at that time?
A. Just about 200 feet.
Q. And how do you know it was the "Bohemian Club"?
A. I could see the mark on the stack.
Q. Could you see any other part of the boat?
A. No, sir.

• • • • • • •

By Mr. Wolff:

Q. Captain, were any channel markings visible when you saw the "Bohemian Club"?
A. Not when I passed the "Bohemian Club," no, sir.

• • • • • • •

By Mr. La Brum:

Q. The point I want to make is that at the time you reached Buoy 2-D the fog was dense, wasn't it, or was it not?
A. I could see about 200 feet.
Q. You could see about 200 feet, and I think you testified on direct examination you heard a lot of fog bells ringing around there when you got to 2-D; why didn't you anchor at 2-D?
A. Because with a ship with a draft of nine feet I don't have to anchor in the channel..
[fol. 25] Q. You were looking for a place other than the channel to anchor?
A. That's right.

• • • • • • •

WILLIAM L. CULLISON, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wolff:

Q. Mr. Cullison, what was your employment on December 20, 1939?

A. Mate on the "Franklin," the motor vessel "Franklin".

Q. That is the ship on which Mr. Nordskog was the master?

A. That's right.

Q. You were bound down the river on the morning of December 20th, were you?

A. Yes, sir.

Q. Do you remember passing the "Bohemian Club"?

A. I remember passing an Atlantic ship anchored on the Bulkhead Bar Range. I didn't see her name, and I am not as familiar with the Atlantic ships as the masters in the company; therefore, I did not recognize it.

* * * * * * *

Q. How far off did you pass her, about?

A. Well, it is very hard to determine in a fog. I would judge around 200 feet, around the length of the "Franklin".

Q. About when was that?

A. It was around 9:45.

Q. Did you hear any signals from this Atlantic ship which you passed at that time?

A. Yes, sir.

Q. What did you hear?

A. The fog bell ringing.

Q. What were the other weather conditions?

[fol. 26] A. The weather conditions?

Q. Yes.

A. Thick fog with visability not exceeding 200 feet.

Q. And the draft of the "Franklin" was about what?

A. Nine feet six.

Q. Where were you at the time?

A. I was at the wheel on the "Franklin".

Q. You continued on down the Bulkhead Range?

A. Yes, sir.

Q. With what intention?

A. Of anchoring as soon as we could find a suitable anchorage.

Q. As you were proceeding down the Bulkhead Range could you hear any fog signals from any vessels other than this Atlantic vessel which you had passed?

A. We heard fog signals from two other vessels anchored.

Q. By the way, was this Atlantic vessel a tanker?

A. Yes, sir.

Q. Could you see these other vessels whose fog signals you were hearing?

A. We could just make out the outline in the fog, except the "Delaware," we passed near enough to her to recognize the name.

* * * * * * *

Q. From 10:05 where were you stationed? Were you standing your watch?

A. I was on the bridge at all times, I didn't leave.

Q. Did you see this collision?

A. I did not.

Q. Did you hear the crash?

A. I did hear the crash.

* * * * * * *

Q. What did you do after the crash?

A. I didn't do anything. I looked up, but I couldn't see anything, the fog was so dense at that time.

Q. Did it continue that way?

[fol. 27] A. For a few minutes.

Q. Then what?

A. The wind struck out from the westward and it started to clear up.

Q. Then what did you see?

A. One of the first things I saw was the "Laura Maersk" backing away from the "Bohemian Club".

Q. Up until that time, until you heard the crash and you later saw the "Laura Maersk" backing away from the "Bohemian Club" had you heard fog signals from any other vessels?

A. I had heard several.

Q. Right straight along.
A. Yes.

. . . . . .

Q. Could you distinguish the vessels these fog signals were coming from?
A. No, I could not.
Q. In your opinion, were the weather conditions such as to have made it safe for the "Bohemian Club," keeping in mind the fact she was a deep draft vessel drawing 27 feet; would it have been safe for her to continue up the stream when you passed her?
A. When we passed her we were looking for anchorage, ourselves, with less than half of her length.

. . . . . .

HURD Q. DOWN, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wolff:

Q. Captain, what was your employment on December 20, 1939?
A. Captain of the "M. S. White Flash".
Q. What kind of a vessel is the "White Flash"?
A. She is a motor vessel.
[fol. 28] Q. How long is she?
A. 200 feet.
Q. What was her draft on——
A. Draft about nine foot six.

. . . . . .

Q. As you proceeded down the river, did you pass the "Bohemian Club" at any time?
A. Yes, sir.
Q. At about what time?
A. Somewhere around ten o'clock.
Q. What were the weather conditions when you passed the "Bohemian Club"?
A. It was foggy with a visibility of anywheres from 150 to 200 feet.

Q. As you passed the "Bohemian Club" did you hear any signals given?

A. I heard a fog bell ringing.

Q. What kind of a sound was it giving out?

A. It was a good clear sound. I heard it a couple of minutes before I got to her. I practically stopped, and was drifting with the tide.

Q. You say before you got to the "Bohemian Club" you stopped and were drifting with the tide?

A. Yes.

Q. Why was that?

A. On account of the location where the vessel was. I heard a bell a little ahead on the port bow.

Q. What did you do after you passed the "Bohemian Club"?

A. After I passed the "Bohemian Club" I went ahead slow drifting on, and I got about half-way on the Bulkhead Range there was a ship anchored right ahead of me. So, I rounded ahead with the tide and anchored.

Q. Could you see that ship that was anchored ahead of you?

A. No, never did see her.

Q. Did you hear fog signals?

[fol. 29] A. I heard his fog signals.

Q. Were you looking for a place to anchor?

A. I wanted to get clear as much as I could. We could anchor anywheres with that draft.

Q. Did you anchor?

A. Yes.

Q. Where?

A. I anchored down just to the westward side of the channel about abreast of 2-B.

* * * * * * *

Q. After you anchored, Captain, where were you stationed?

A. I was in the pilot house most of the time and in my room, which is adjoining the pilot house, with the door open all the time.

Q. Did you see the collision between the "Bohemian Club" and the "Laura Maersk"?

A. Yes, sir.

Q. Where were you at the time?

A. At the time I was standing in the pilot house. There was sort of a squall came up from the westward. In fact, the western shore was clear at the time, and the fog seemed to be going over, and we were just about getting ready to get our engines ready.

Q. What did you see?

A. Of course, I was looking ahead, and the "Club" was right ahead of us, and I saw this ship bearing down on her.

Q. When you speak of this ship, are you referring to the "Laura Maersk"?

A. I guess that was her name. I never read her name.

Q. Up until that time had you been able to see the "Bohemian Club"?

A. No, sir, I hadn't seen her at all.

Q. About how far from the "Laura Maersk" was the "Bohemian Club" when you first saw her?

A. That is really hard to judge the distance which I was away from her. I was probably a half a mile away from her or a little better.

[fol. 30] Q. You say you were anchored on the westerly side of the channel?

A. Yes, sir.

. . . . . .

Q. You say a squall, as you called it, came up from the west?

A. Yes, the wind came out of the west, the fog seemed to be blowing right straight over. In fact, the western shore was clear——

Q. Was it at that moment you saw the "Laura Maersk" bearing down on the "Bohemian Club"?

A. Practically at the same time the fog was sweeping from the west to the east.

Q. Up to that time you say you had not been able to see the "Bohemian Club"?

A. I hadn't been able to see any ships of any kind.

Q. Were there any other vessels anchored in the vicinity you were anchored?

A. Yes, several were there.

Q. Could you see them?

A. No, I couldn't see them, not until after it cleared up.

. . . . . .

Q. How did you know there were other vessels anchored in your vicinity?

A. I could hear the fog bells.

Q. Were you able to distinguish the bells as coming from any particular vessels?

A. No, you couldn't tell which was which.

* * * * * * *

Q. Captain, in your opinion, based upon your experience as a navigator, and your knowledge of the water of the Delaware River, would it have been safe for the "Bohemian Club" to have proceeded under way at any time prior to this collision?

A. No, sir, not a vessel of that draft, I wouldn't say so. [fol. 31] Q. How much visibility did she have up until the time of the collision?

A. Well, the visibility around there was practically nil all the time.

Q. Under those circumstances, do you think it would have been safe for the "Bohemian Club" to have undertaken to keep under way and proceed up the river?

A. No, sir, I don't, because she would have to keep right in the channel, and if you couldn't see no aids to navigation, it is a pretty hard thing to do.

Q. Where was the nearest anchorage ground above the point the "Bohemian Club" was anchored?

A. Roughly, about four miles up to Deepwater Point.

Q. Where was the nearest anchorage ground below her?

A. Well, the nearest regular anchorage ground was, roughly, about the same distance, about five miles.

Q. At what point?

A. Reedy Island.

* * * * * * *

Cross-examination.

By Mr. La Brum:

* * * * * * *

Q. You say that at the time you passed the "Bohemian Club" visibility was nil?

A. No, I didn't say when I passed the "Bohemian Club."

Q. You said in answer to Mr. Wolff's question——

A. I said the visibility was around 150 to 200 feet.

Q. At the time you passed her?

A. At the time we passed her. Almost immediately afterwards we run into a fog that was practically nil.

. . . . . .

Q. How far had you proceeded past the "Bohemian Club" when you ran into this blanket of fog?

A. Oh, that was only just a—maybe a minute, something like that, and I was just drifting, practically, along at a real slow speed.

[fol. 32] Q. Approximately what was the distance, would you say? Was it a ship's length?

A. Oh, yes, I guess I went a ship's length, probably I did, maybe a quarter of a mile.

. . . . . .

Q. I think you said in direct examination, in your opinion, at the time you passed the "Bohemian Club" it was unadvisable to proceed, is that correct?

A. For a vessel of that class, yes.

Q. Was there a difference between a vessel of that class and a vessel of your class?

A. There is a whole lot of difference. I could go anywheres; I didn't have to keep in the channel if I didn't want to. In fact, I ran down the western side of the channel all the way down the river, frankly.

. . . . . .

Redirect examination.

By Mr. Wolff:

. . . . . .

Q. When you anchored, did you hear fog signals from more than one vessel?

A. Yes, sir.

Q. Can you give us any idea how many vessels were in the vicinity sounding fog signals?

A. Three or four.

Q. Could you distinguish that?

A. I could distinguish that there were different bells; what I mean, sort of different localities.

Q. Now, was there any particular reason why you didn't anchor sooner than you did? You knew you were on Bulkhead Range?

A. Sooner than I did?

Q. Yes.

A. One reason why, I thought I would get down as far as I could. With that draft I could anchor on the westward or eastward side and be out of the channel of anything that was moving.

[fol. 33] Q. Were you looking for an anchorage when you passed the "Bohemian Club"?

A. Looking for an anchorage?

Q. Yes.

* * * * * * *

MARTIN SUHAY, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wolff:

Q. Mr. Suhay, what was your employment on December 20, 1939?

A. I was an able seaman.

Q. On what boat?

A. "Bohemian Club".

Q. What was your watch on December 20, 1939?

A. Eight to twelve.

Q. When you went on watch at eight o'clock that morning where did you stand your watch?

A. I relieved the lookout on the forecastle head.

Q. You were on the forecastle head, were you?

A. Yes, sir.

Q. What were you doing on the forecastle head?

A. Ringing the bell.

Q. What bell were you ringing?

A. Fog bell.

Q. How often did you ring that bell?

A. About five seconds every minute.

Q. What kind of a sound has that bell?

A. Loud, clear.

Q. When you went on the forecastle head at eight o'clock to ring that bell, was your ship anchored?

A. She was anchored.

Q. How was the weather?

A. It was foggy, thick fog.

Q. Did you see any buoy?

[fol. 34] A. No, sir, I did not.

Q. How long did you stand there on watch?

A. From eight until ten.

Q. Were you ringing the bell during the whole of that period?

A. Yes, sir.

Q. At any time until ten o'clock, did you see any buoys?

A. No, sir, I didn't.

Q. What did you do at ten o'clock?

A. I was relieved by the quartermaster.

Q. What was his name, do you remember?

A. Thompson.

* * * * * * *

Cross-examination.

By Mr. La Brum:

Q. You said the fog was thick from eight to ten, is that correct?

A. That's correct.

Q. What was your visibility between eight and ten?

A. It was hardly any, it was thick.

* * * * * * *

ALEXANDER LINTZ, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wolff:

Q. Mr. Lintz, what was your employment on December 20, 1939?

A. Boatswain.

Q. On what ship?

A. The "Bohemian Club".

* * * * * * *

Q. When did you go on watch that morning?

A. Eight to five.

[fol. 35] Q. You worked from eight to five; where were you from eight o'clock on? Just tell us what you did. When you went on watch at eight o'clock, the "Bohemian Club" was anchored, was she?

A. Yes, sir.

Q. What were the weather conditions?

A. Fog, raining, thick.

Q. Thick what?

A. Fog.

Q. Did you see anything?

A. No, I didn't see anything.

Q. Where did you go?

A. Up in the forward storeroom.

Q. How long were you there?

A. Practically all morning.

Q. What were you doing out there?

A. Cleaning up.

Q. That forward storeroom is underneath the forecastle head, isn't it?

A. Yes, sir.

Q. While you were in that storeroom did you hear the "Bohemian Club" giving any signals?

A. I heard the fog bell ringing continually.

Q. How often were they?

A. They ring on top of your head all the time; you hear them going all the time.

* * * * * * *

Cross-examination.

By Mr. La Brum:

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Q. Was it a loud bell?

A. Yes.

Q. Very loud?

A. Yes, sir.

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[fol. 36] HERBERT E. THOMPSON, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wolff:

Q. Mr. Thompson, what was your employment on December 20, 1939?
A. A. b. and quartermaster.
Q. Do you hold an a. b. certificate?
A. That's right.

. . . . . .

Q. But on December 20, 1939, you were on the "Bohemian Club"?
A. That's right.

. . . . . .

Q. What was your watch, Mr. Thompson?
A. Eight to twelve.
Q. What did you do at eight o'clock?
A. Well, I started on the bridge.
Q. Was the ship anchored?
A. Anchored.
Q. When you went on the bridge at eight o'clock?
A. Right.
Q. What were the weather conditions?
A. Foggy.
Q. Could you see anything?
A. Not far, not much to see.

. . . . . .

Q. You were off and on the bridge until when?
A. At about ten or fifteen minutes of ten I sneaked off and got my cup of coffee. I don't smoke cigarettes.
Q. That was about ten o'clock, you say?

. . . . . .

Q. Then what did you go?
A. Right on the forecastle head.
Q. Did you relieve anybody there?
A. I relieved Suhay.

[fol. 37] Q. And how long did you stay on the forecastle head when you were there?

. . . . . .

A. It might have been fifteen minutes, it might have been twenty minutes.

. . . . . .

Q. Were you on the forecastle head the whole time?
A. Sure.
Q. Until when?
A. Until I got relieved.
Q. When were you relieved?
A. When the ship picked up the anchor.
Q. Who relieved you?
A. Suhay.
Q. Where did you go when you were relieved?
A. Up to the bridge at the wheel.

. . . . . .

Q. Then where did you go?
A. I went back on the forecastle head and relieved Suhay.
Q. What did you do when you went back on the forecastle head?
A. I started to ring the bell again.
Q. And how often did you ring that bell?
A. About five seconds every minute.
Q. What kind of a sound has it?
A. It has a good sound. You can hear it a long distance.
Q. Did you see this collision?
A. I did.

. . . . . .

By the Court:

Q. The question is when you saw the collision where were you standing.
A. I was about midships then. I had already gotten orders to get off the forecastle head.

[fol. 38] By Mr. Wolff:

Q. Who gave you the orders to get off?
A. The third mate.

Q. How did he give you those orders? Did he say something to you?

A. I couldn't hear from there; he waved back.

Q. He motioned for you to go away?

A. Yes.

Q. Up until that time had you seen this Danish ship that ran into you?

A. Yes, just before I got orders to get off the forecastle head. I hardly had time to report it, even.

Q. Just before you got orders you saw this Danish ship, and you say you didn't have time to report it when the mate called you back?

A. When I heard the fire alarm going.

Q. When you first saw this ship how far off was she, have you any idea?

A. I would say she was over a ship's length; about 400 feet, I imagine.

Q. How much of that ship could you see?

A. The way she was coming she was about four or five degrees on the port bow from where I was standing at the time.

Q. Was there any fog at the time?

A. The fog was just about blowing away, the wind was coming from the west; I imagine the west, I am not much good on them courses. The wind was blowing in the opposite direction. It seemed to blow it right away, cleared the ship up a little bit.

Q. You were keeping a lookout there, were you?

A. That's right.

. . . . . .

Q. When the mate motioned you to come away, what did you do?

A. I just run; I didn't walk, either.

Q. Did you feel the collision?

[fol. 39] A. I did.

Q. And how far had you been able to run before you felt the impact of the collision?

A. Well, I stopped amidships and turned around to watch it strike, and when it struck I carried on back aft. I thought there might be an explosion, so I didn't stop no longer.

Q. Mr. Thompson, up until the time you saw this ship just about a length ahead of you, could you see any buoys?

A. No, I couldn't see any buoys.

Q. What was the weather condition up until that time?

A. It was pretty thick, it was very foggy. There was no visibility at all most of the time.

Q. Were you on the forecastle head ringing the bell the entire time from ten o'clock until the collision occurred with the exception of whatever the interval was when you were on the bridge while they were shifting the anchor?

A. That's right.

Q. That is correct, is it?

A. Yes.

* * * * * * *

Cross-examination.

By Mr. La Brum:

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Q. Wasn't it foggy when you saw the ship 400 feet away?

A. It was foggy, but you could see this ship.

* * * * * * *

Q. That is all the further you could see, 400 feet, is that what you mean?

A. That's right. Just about that time she was just breaking through the fog.

* * * * * * *

Q. I think you said that you were ringing the bell just prior to the time that you saw the ship, is that correct?

A. That's right.

[fol. 40] Q. And how were you faced as you rang the bell?

A. I was facing forward as I always do.

* * * * * * *

Q. When you returned to your position from the bridge to the forecastle head, as lookout, what were the weather conditions?

A. It was thick, foggy.

Q. How far could you see at that time?
A. Oh, it wasn't very far.
Q. It wasn't very far?
A. No.
Q. Could you see any buoys?
A. No.

* * * * * * *

Q. Did you hear any signals from any other ships?
A. Well, I thought I did hear a whistle.
Q. You thought you did hear a whistle?
A. I wasn't sure, it was very faint.
Q. About what time was that?
A. That was, I would say, before the collision, just a little before.
Q. Immediately before the collision?
A. A little before.
Q. Where did you think that whistle came from?
A. As a matter of fact, as I took it to be a whistle and couldn't make out where it came from, couldn't make out what kind of a whistle it was, whether it was steam or air, whatever it may have been, I jumped to the bell and rang loud, good and loud, and tried to get another response from the whistle, but I didn't hear any, and when I stepped back about ten feet and looked forward, there was this ship, coming down there in the fog.
Q. Did you report the whistle to the bridge?
A. I hadn't time.

* * * * * * *

A. I said what I took to be a whistle of some kind, I grabbed the bell and rang it again, and I stepped back [fol. 41] about ten feet, and I looked forward and looked around, and I couldn't see anything, and I couldn't hear anything. So, I stepped back to the bell again and rang it once more, and when I turned it loose I looked forward, and there was this ship coming down on us about a ship's length or 400 feet away.
Q. Then what did you do?
A. When I grabbed the bell about the second time and turned it loose, there was the ship, and I pointed to the bridge, but by that time the alarm was already on.

Q. Other than that one whistle you didn't hear any other whistles during the entire time that you were on watch that morning?

A. That was the only whistle I heard.

JOHN DI FILIPPO, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wolff:

Q. Mr. DiFilippo, you were on the "Bohemian Club" on December 20th, 1939, were you?

A. Yes, sir.

Q. What was your rating?

A. Ordinary seaman.

* * * * * * *

Q. At ten o'clock after you had coffee you went back into the forward quarters under the forecastle head?

A. Yes.

Q. Did you stay there until the collision occurred?

A. Yes.

Q. At that time when you went back in the forecastle head at ten o'clock did you notice the weather conditions?

A. Yes, it was foggy and rainy.

Q. Could you see anything?

[fol. 42] A. No.

Q. Could you see any buoys?

A. No, sir.

Q. See any ships?

A. No, sir.

* * * * * * *

Q. While you were there in the forecastle could you hear any signals from the "Bohemian Club"?

A. Yes, sir, all the time.

Q. What did you hear?

A. You could hear the ringing of the bell.

Q. What bell was that?

A. The bell on the forecastle head, the fog bell.

* * * * * * *

HENRY EUGENE ROWE, recalled.

Redirect examination.

By Mr. Wolff:

Q. Captain, did the "Bohemian Club" have a gyro compass on board?

A. Yes, sir, Sperry Gyro.

Q. Sperry Type; does that compass record your course as you go along?

A. Yes, sir.

* * * * * * *

Q. Captain, what time was it when you anchored, according to that?

A. 7:41.

Q. At that time, 7:41, how was the tide running?

A. The tide was flooding.

Q. It had not yet ebbed?

A. No, sir.

Q. What time was it when the tide finally settled down to ebb?

A. At about 9:10.

* * * * * * *

[fol. 43] Q. When the tide is changing from floor to ebb, what takes place during the interval, and how long does it take for the tide to get set?

A. Anywhere from three-quarters of an hour to an hour and fifteen minutes.

* * * * * * *

Q. At 9:10 you were headed how?

A. About 30 degrees true.

Q. And how long did you keep that heading?

A. Until the time of the collison.

* * * * * * *

Q. From 7:41 until 9:10 what was your ship doing? How was she heading?

A. My ship was headed off to the——

Q. Just read your record. From 7:41 up until 9:10 give us the extremities, if you will, heading on either side.

A. She swung off as far as 110 degrees due to the flood tide.

. . . . . .

Q. My question is how do you account for those extreme variations in your course from 7:41 to 9:10?

A. The change of the tide.

. . . . . .

Q. Is the Bulkhead Bar Range in the center of the channel?

A. No.

Q. How many feet to the eastward of the Bulkhead Bar Range is the easterly side of the channel?

A. 400 feet.

Q. And from the range to the westerly side of the channel?

A. 800 feet.

Q. When you shifted your anchor did you drift down on a 30 degree course?

A. Yes, sir. She wound up on 30 degrees.

. . . . . .

[fol. 44] By Mr. La Brum:

Q. No, but at ten o'clock when the weather cleared, you knew she was 150 feet from the Buoy 2-D?

A. Approximately.

. . . . . .

Q. Would you, if the tide had changed, swung into it or away from it?

A. Again, I don't know that.

Q. You would assume the same position you had at 7:41, wouldn't you?

A. I don't know that. This was on the turn of the tide, and the tide is boiling in that narrow cut. She might have been going one way or the other——

. . . . . .

By Mr. La Brum:

Q. I think you said, Captain, that at ten o'clock, approximately ten o'clock when you moved your ship you could see the Buoy 2-D very plainly?

A. Yes, sir.

Q. That is an aid to navigation, isn't it?

A. Yes, that is one.

Q. It was on your right side of the channel, wasn't it?

A. That was one, yes.

Q. It was on your right side of the channel, wasn't it?

A. Yes.

Q. Why didn't you move further up the channel in relation to that aid to navigation if you could see it so plainly?

A. There wasn't time, to begin with.

Q. What do you mean, there wasn't time? Did you attempt to do it?

A. No, the fog——

Q. You did not?

Mr. Wolff: Go ahead, finish your answer. Don't let him cut you off, Captain.

[fol.45] Mr. La Brum: He said he didn't.

Mr. Wolff: He said something about the fog.

What is your answer, Captain

The Witness: The fog set in suddenly again and it was necessary to anchor.

. . . . . .

A. Do you have the deck log there?

By Mr. Wolff:

Q. The rough log?

A. Yes.

(The log was shown to the witness.)

By Mr. La Brum:

Q. What is your first maneuver?

A. At what time?

Q. At or about ten o'clock, when you began to make your change.

A. When I got my anchor up?

Q. No, start with your stand by. What time was your stand by?

Mr. Wolff: Well, it is 10:13 there, isn't it?

By Mr. La Brum:

Q. 10:08, isn't it?
A. 10:08, stand by.
Q. What is the next maneuver?
A. 10:13, I follow up slow ahead.
Q. What is the next maneuver?
A. 15, stop.
Q. What is the next one?
A. 18, let go the starboard anchor.

• • • • • • •

By the Court:

Q. What were you doing between 10:08 and 10:13?
[fol. 46] A. At 10:08 was stand by on the engines. That means that the mate on the forecastle head had to lock the windlass, which is an operation in itself; also, to give the engineers time below to get the engine ready, condensation out of the cylinders of this ship, which is an up and down engine, it is called.

• • • • • • •

Q. I think you testified, also, yesterday in your direct examination that there was no attention paid to the fractions of a minute. Did you confine that statement to your bell book or did you mean that as well for the engineers' bell book?
A. For both.

• • • • • • •

Re-direct examination.

By Mr. Wolff:

Q. Now, Captain, when your ship was at anchor your course recorder shows these variations in the heading; does that mean that your bow has changed any, or does it mean that your stern has changed?
A. That means that the stern has changed.

Q. The bow remains in its position?

A. Yes, sir.

Q. And the ship swings around on the bow, is that what you want us to understand?

A. Swings on her bow.

Q. Then as she swings on her bow she changes her compass heading, and that is recorded on the course?

A. That is recorded on the course.

• • • • • • •

RICHARD H. DUNPHE, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wolff:

Q. Mr. Dunphe, were you the second officer on the "Bohemian Club" on December 20, 1939?

[fol. 47] A. Yes, sir.

Q. What was your watch?

A. From midnight until four in the morning, and from noon until four in the afternoon.

• • • • • • •

Q. What time did you get up?

A. About 10:30.

Q. And then you went to the messroom and had breakfast?

A. No, I went to the bathroom and got dressed.

Q. You got dressed, and then where did you go?

A. I took a look out on deck; I heard the fog bell going when I woke up.

Q. What time did you take a look out on the deck?

A. As soon as I woke up, I heard the fog bell going.

Q. What were the weather conditions?

A. Dense fog.

• • • • • • •

A. I first came out on deck dressed up about twenty minutes of eleven, perhaps.

Q. About twenty minutes of eleven; what were the weather conditions then?

A. Dense fog.

Q. Did you hear any signals from the "Bohemian Club"?

A. Yes, I heard the fog bell going, yes, sir.

Q. How long did you hear those fog bells going after that? These fog signals.

A. I heard it sounding all the time.

Q. Until when?

A. Until the general alarm went off.

• • • • • • •

Q. Do you hold a pilot's license for the Bay and River of Delaware?

A. Yes, sir.

[fol. 48] Q. How long have you held that license?

A. About three years.

• • • • • • •

Q. In a fog and in the absence of anything to indicate channel limits, has a navigator anything at all to guide him in placing his vessel?

A. Absolutely not, no, sir.

Q. Can you tell me how much progress you are making forward, progress through the water by putting your engines ahead or astern in a dense fog?

A. No, not from a start to head or stern you couldn't tell.

• • • • • • •

Q. How frequently was that fog signal given?

A. Every minute.

Q. And what kind of a signal was it every minute?

A. It was a loud, clear, distinct ringing of the bell.

Q. How many taps?

A. A series of taps for four or five seconds.

• • • • • • •

Q. Did you hear any signals at any time from the "Laura Maersk"?

A. No, sir.

Q. Mr. Dunphe, can you explain to us what happens when the tide changes from flood to ebb? First of all, is that a sudden change, and if not, what takes place?

A. No, it isn't a sudden change; it is a very gradual change.

Q. During the course of that change what takes place?

A. The flood tide to ebb, you say?

Q. Yes.

A. The force of the flood tide will gradually diminish and you will have a period of slack water?

Q. What do you mean by a period of slack water?

A. When thare is no tide at all.

. . . . . .

[fol. 49] Q. Is it necessary for a vessel to have steerage way in order to navigate her in the sense that she is changing her course?

A. Absolutely.

Q. How much steerage way does a vessel such as the "Bohemian Club" require in order to properly and safely navigate it? How much speed would she have to have?

A. Four or five knots.

. . . . . .

Q. What would be the minimum speed which you would require under any conditions in order to have proper steerage way?

A. She would have to have a speed of four or five knots to steer.

Q. Is there any particular reason for that, Mr. Dunphe?

A. Yes, sir. It would take that much speed for the rudder to have effect.

. . . . . .

HARRY L. LYONS, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wolff:

Q. Mr. Lyons, were you the chief officer on the "Bohemian Club" on December 20, 1939?

A. Yes, sir.

Q. What was your watch that morning?

A. Four to eight.

Q. Where did you stand your watch?

A. I stood it on the bridge, part of it on the bridge.

Q. The log book which has been offered in evidence and the testimony shows your vessel was anchored at 7:41 A. M., is that correct?

A. That's right, sir.

[fol. 50] Q. Where were you stationed at the time that the vessel was anchored?

A. On the forecastle head; I let the anchor go, sir.

. . . . . .

Q. What were the weather conditions when you dropped the anchor at 7:41 A. M.?

A. Very thick with fog, sir.

Q. Could you see any channel buoys?

A. No, sir.

Q. 2-D, or any other buoy?

A. No, sir, I didn't see any buoys.

Q. Did you see Buoy 2-D?

A. No.

. . . . . .

Q. What licenses do you hold?

A. Master of all oceans, sir.

Q. Do you hold any pilot's licenses?

A. Yes, sir, I hold a first class pilot's license for the Delaware River and Bay.

Q. How long have you held that license?

A. Ten years.

Q. In your opinion, would it have been safe for the "Bohemian Club" to have continued up the stream after 7:41 when she anchored?

A. No, sir.

Q. Why not?

A. On account of the dense fog, you couldn't see anything.

Q. Was there any necessity for anchoring prior to that time?

A. No, sir. We had anchored previously that morning on the Liston Range.

Q. That was earlier in the morning?

A. That was earlier in the morning, yes, sir.

Q. Then what?

A. Then we got under way and proceeded up the river.

Q. Had it cleared up sufficiently?

[fol. 51] A. It had cleared up sufficiently to get under way.

Q. Was there any necessity for anchoring until you found yourself on the Bulkhead Bar Range?

A. No, sir.

Q. Your nearest anchorage ground below the Bulkhead Bar Range was where?

A. That would be Reedy Island.

Q. That was about how far below where you anchored?

A. Oh, I judge about five miles.

Q. And your nearest anchorage ground above the point where you anchored was where?

A. Deepwater Point, sir.

Q. That was approximately where?

A. Four or five miles, sir.

Q. Up the stream?

A. Up the stream, yes, sir.

Q. When you anchored the vessel was anybody stationed on the forecastle head?

A. Yes, sir. I had a man to help me let go.

Q. After the vessel had been anchored, did the "Bohemian Club" give any signals?

A. Yes, sir, a fog bell was ringing after we anchored.

* * * * * * *

Q. Did you hear the fog bell being sounded?

A. Oh, yes, sir.

Q. From the time that you anchored?

A. Yes, sir.

Q. Until when?

A. Until the time of the collision.

Q. What kind of a bell has the "Bohemian Club"?

A. It has got a regulation fog bell that is at least 12 to 14 inches in diameter.

Q. Is that the regulation, usual and customary size?

A. Yes, sir.

Q. What kind of a sound does it emit?

A. Good, loud, clear soundings.

* * * * * * *

[fol. 52] Q. Before you get to eleven o'clock, do you know whether or not your vessel anchored shortly after ten o'clock?

A. Yes, sir. About 10:18, I think the time was, the master sent word down for me to stand by the anchor.

. . . . . .

Q. The mate summoned you to go where?

A. To go up on the forecastle head, sir, and heave up the anchor.

. . . . . .

Q. While you were heaving up the anchor could you see Buoy 2-D?

A. I saw it, yes, sir.

Q. Can you give us some estimate as to how far distant it was, and how it was bearing to your ship?

A. It bore, I should say, approximately 45 degrees on the bow.

Q. Which bow?

A. On the starboard bow, sir.

Q. About how far distant was it?

A. About 150 feet.

. . . . . .

Q. After the anchor was dropped, what movements, if any, did the ship make? Did she move forward or go astern, or what happened?

A. She dropped astern a little, took up the slack in the chain.

Q. How many fathoms did you have out?

A. I had two shots out, sir.

Q. Two shots is how many feet?

A. 180 feet.

. . . . . .

Q. Were you still on the forecastle head when the anchor chain straightened out?

A. Yes.

Q. And the vessel became at rest?

[fol. 53] A. Yes, sir.

Q. Could you then see the Buoy 2-D?

A. No, sir, couldn't see anything then.

Q. How do you account for that? What were the weather conditions?

A. That was due to the thick fog setting in thick again.

. . . . . .

Q. You say after the "Bohemian Club" had shifted her anchor about 10:18 you were variously occupied about the ship; will you tell me now when was the first intimation you had of any collision?

A. I was eating lunch in the saloon about 11:30, or somewhere thereabouts, and I heard the alarm bells and the whistles, and I looked out——

. . . . . .

Q. Then what did you do?

A. As soon as I heard the commotion I dashed up on the bridge as quick as I could.

. . . . . .

A. When I got on the bridge I saw the "Laura Maersk" approaching us on the port bow.

Q. How was she headed with respect to your ship?

A. At the time that I saw her she was at least four or five degrees on the port bow, and she was swinging towards our bow.

Q. How much of the "Laura Maersk" was visible at that time?

A. The fore part was visible, as near as I can remember.

Q. And about how far distant was the ship?

A. She was close aboard at that time, sir.

Q. How close to your ship would you say she was?

A. She was so close that I got ready for the impact when I got on the bridge, stood by for the impact.

Q. What were the weather conditions at that time?

[fol. 54] A. They were still hazy, but the wind was coming from the west then, it had started to clear up.

Q. Not to the west, from the west?

A. From the west, yes, sir.

Q. What effect did that have on the fog?

A. That had a tendency to clear the fog up.

. . . . . .

Q. Were the weather conditions at any time before this collision occurred such as to have made it safe, in your opinion, for the "Bohemian Club" to have continued on her way up stream?

A. No, sir.

Q. And why not?

A. On account of the foggy conditions, sir, which made it unsafe for navigation.

Q. Mr. Lyons, how long have you been navigating up and down the Delaware River?

A. At least 12 years, sir.

Q. And you held a pilot's license for the Delaware Bay and River how long?

A. About ten years.

Q. Can you tell us what happens when the tide changes from flood to ebb? What phenomena take place prior to its set on its course, heading down the stream?

A. You mean the interval between the two tides?

Q. Yes.

. . . . . .

A. There is what is known as a slack water interval.

Q. That slack water interval lasts for about how long?

A. Well, I would say 40 to 45 minutes, or thereabouts, due to the conditions at the time.

. . . . . .

Q. When this vessel was headed on a course of 112 degrees at 8:10 A. M., she was at an angle with the Bulkhead Range of how many degrees? It was the difference between 9 and 112, wasn't it?

[fol. 55] A. Yes.

Q. And that would be 103?

A. Yes.

Q. And that would be in the right angle, of course?

A. Yes.

. . . . . .

Q. She was lying across the channel at right angles?

A. Yes, sir.

. . . . . .

Q. How do you account for that fact? Can you account for that fact, that circumstance, Mr. Lyons?

A. I would account for it due to the change of tide, change of current; that is the only way I can account for it.

. . . . . .

Q. You mean the fluctuations of the tide between what points or stages of the tide?

A. Yes, that must be due to the vagaries of the tide.

Q. Between what?

A. Between the ebb and flood.

* * * * * * *

Cross-examination.

By Mr. LaBrum:

Q. Mr. Lyons, how wide is the channel on the Bulkhead Range?

A. 1200 feet.

* * * * * * *

Q. During the time you were on watch from four to eight did you see any vessels either forward of you or passing you?

A. You mean going up and down the stream?

Q. Yes.

A. I can't remember.

Q. Did you see the "Gulfpride" going up forward of you?

A. She was ahead of us some time during the coming up, I remember that.

* * * * * * *

[fol. 56] Q. When did you first see the "Gulfpride"?

A. I just casually noticed her ahead, that is all.

Q. How far ahead of you was she?

A. I judge about half a mile.

* * * * * * *

Q. And you followed her up to 2-B, did you?

A. Yes, we had to follow her.

Q. Where did you lose her?

A. Just as soon as the fog set in.

Q. And that was where?

A. That was coming around 2-B and coming around the Bulkhead.

Q. Did you see or hear her after that?

A. I heard her, I did not see her.

Q. What did you hear?

A. Three whistles, which signalled she was going full astern.

• • • • • • •

Q. What did that indicate to you the "Gulfpride" was doing?

A. It indicated to me she was going full astern and was preparing to drop her anchor. That is the way I would interpret it.

Q. Did you interpret it that way as the officer on watch?

A. That is the way I would have determined it, yes, sir?

• • • • • • •

Q. And I believe at or about 10:30 o'clock you stated that the master sent for you, is that correct?

A. Yes, sir.

Q. And told you to go forward to stand by the anchor?

A. Yes, sir.

Q. And did you go forward to stand by the anchor?

A. Yes, sir.

Q. What aids to navigation could you see when you went forward to stand by the anchor?

A. I saw the 2-D at that time.

[fol. 57] Q. You saw the 2-D plainly?

A. You could see it all right.

• • • • • • •

Q. Had the visibility improved any by 10:13?

A. At 10:13 it had improved enough so that you could see the 2-D.

• • • • • • •

Q. At the time you dropped your anchor could you see any aids to navigation at 10:18?

A. No, sir.

• • • • • • •

Q. You were on the forecastle head?

A. Yes.

Q. And you couldn't tell the movement of the ship going forward or backward?

A. She wouldn't be moving very fast either way. You must remember there was a current coming down, which is just exactly like movement through the water.

Q. But when you dropped your anchor you float down away from the anchor, don't you?

A. Yes, sir.

* * * * * * *

Q. Did you fix your position as of 10:13 when you hove in the anchor?

A. Yes, when I went up there I saw a buoy off on the starboard bow.

Q. How far off the starboard bow?

A. I should say around 150 feet.

* * * * * * *

Q. At 10:18 when you dropped your anchor again could you fix your position?

A. No, I couldn't.

Q. You could not fix your position?

A. No, sir.

Q. Would you say that you were above or below the position that you occupied at 10:13 when you hove in your anchor?

[fol. 58] A. I would suppose we were below it.

Q. You were below it?

A. Yes.

Q. How much below it would you say you were?

A. Below 2-D?

Q. Below the position that you occupied at 10:13.

A. Yes, I couldn't say exactly, but it must have drifted back some.

Q. You did drift back some?

A. Yes.

Q. Could you see it when you dropped the anchor at 10:18, Buoy 2-D?

A. 2-D, no, sir.

* * * * * * *

Q. At 7:41 you had two shots of anchor chain out, did you?

A. Two shots of chain out.

Q. And you had the same two shots of anchor chain out when you dropped your anchor at 10:18?
A. Yes, sir.

• • • • • • •

Re-direct examination.

By Mr. Wolff:

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Q. Now, the master of the "Bohemian Club" testified, and the log shows, that at 10:08 A. M. the order was given stand by, at 10:13 the anchor was hove up and the engine was put slow ahead, and he turned his rudder to the right, and at 10:15 he stopped his engine. What effect upon the heading of the vessel would the halfspeed ahead and the right rudder have?
A. You said he had his rudder hard right?
Q. Yes.
A. That would throw his bow, in that case, to the starboard.
Q. Would that maneuver, half-speed ahead and the rudder to the right, have any effect upon his position in the channel with respect to the easterly and the westerly side? [fol. 59] A. Yes, that would keep it from going out to the westward in the channel.

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Otto Hamann, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wolff:

Q. Mr. Hamann, were you third mate of the "Bohemian Club" on December 20, 1930?
A. Yes.

• • • • • • •

Q. When did you stand your watch on the bridge?
A. Eight to twelve.

Q. When you were on the bridge at eight o'clock was your ship anchored?

A. Yes.

Q. What were the weather conditions?

A. Dense fog and rain.

Q. Did you remain on the bridge up until the time of the collision?

A. And after, all the time and after.

* * * * * * * *

Q. When the anchor was shifted at 10:13 did you see the Buoy 2-D at the head of the Bulkhead Bar Range?

A. I saw that buoy before the anchor was hove up.

Q. When did you see the 2-D, that is the upper range of the Bulkhead Bar, not 2-B, but 2-D; when did you first see 2-D?

A. Some time near ten o'clock.

Q. Could you see it after the vessel was shifted further down?

A. No.

Q. Why not?

A. The fog was too dense.

* * * * * * * *

[fol. 60] Q. While the anchor was being shifted, what did Thompson do?

A. He was at the wheel.

Q. During the interval while the anchor was being shifted?

A. Yes, sir.

Q. Then where did he go?

A. He went back on the forecastle head and rang the bell again.

Q. How long did he stand there?

A. Until immediately before the crash I called him away.

Q. What was he doing there?

A. Ringing the fog bell.

Q. How often did he ring it?

A. Every minute.

Q. Right up to the time of the collision?

A. Yes, sir.

Q. While you were at anchor there during your watch from eight o'clock up until the time of the collision did you hear the fog bells or signals from any vessels?

A. Yes, I heard the bells of ships at anchor astern of the "Bohemian Club."

Q. You did hear those bells?

A. Yes.

Q. Until when, about?

A. All morning.

Q. Up until the time of the collision?

A. Yes.

Q. Did you ever hear any whistle or bell of any ship ahead of you further upstream?

A. I heard the fog whistles of the ships that passed while they were passing by.

[fol. 61] Q. That was around ten o'clock, you said?

A. Yes.

. . . . . .

Q. Did you hear any signal of any kind from the "Laura Maersk"?

A. No.

Q. Did you see the collision?

A. Yes.

Q. Just tell us exactly what you saw.

A. I saw the fore and main masts of the "Laura Maersk" coming out of the fog about five degrees on the bow from where I was standing in the middle of the wheel house at that time when I saw her.

Q. What did she do? Go ahead with your story.

A. I turned around to tell the captain about it. He was standing at the window.

Q. What did you say to the captain?

A. When I turned around I saw that he was already seeing her, himself. So, I didn't waste any time telling him it was a ship. I just shouted to him, "She is coming right at you, Captain." Then I turned around to go to the telegraph because I expected the captain to give me orders, but he did so, himself.

Q. What did you see him do with the telegraph?

A. He put her full astern.

Q. Then what?

A. He also grabbed the whistle and blowed the danger signal.

Q. How many times did he blow that whistle?

A. I did not count them, but several times.

Q. By several do you mean two, or more than two?

[fol. 62] A. More than four.

Q. Do you know how many more than four?

A. No.

Q. All right, now, go ahead. Then what happened?

A. I proceeded to go outside of the wheel house on the starboard side. Before I got there I collided with Mr. Lyons, who just came up from below. I kept on going on the outside on the bridge and whistled to the man on the forecastle head to warn him of the approaching danger and get him away from it.

* * * * * * *

A. Then I stepped back to the wheel house to be near the captain, and at that moment she crashed.

Q. About how far off was the "Laura Maersk" when you first saw her?

A. In my estimation, about the twice the length of a ship.

Q. Of whose ship?

A. No more.

Q. Of whose ship?

A. Of the "Bohemian Club".

* * * * * * *

Q. Could you see her bow at that time?

A. The bow proceeded out of the fog immediately afterwards.

Q. When you first saw the bow of the "Laura Maersk" how far was it from you, approximately?

A. Some four or five hundred feet.

* * * * * * *

Q. Captain, from the time that you saw the "Laura Maersk" loom up out of the fog until the collision occurred was there time enough to have payed out hawser chain, anchor chain?

A. No, sir, positively not.

[fol. 63] Q. It could not have been done?

A. No.

Q. In your opinion, was there anything that the master could have done to have avoided this collision?

A. Nothing, nothing but what he did.

Q. At any time up until the collision and from the time you went on watch at eight o'clock were the weather conditions such as would have made it safe for the master of the "Bohemian Club" to have continued on up the river?

A. No, at no time.

* * * * * * * *

Cross-examination.

By Mr. La Brum:

* * * * * * * *

Q. I think you said you saw 2-D first about ten A. M., is that right?

A. About that time.

Q. How long before ten A. M. had you seen 2-D? Could you place it for any appreciable time before ten A. M.?

A. No.

Q. You could not?

A. No.

Q. How long before you lifted the anchor did you see 2-D?

A. Approximately five or ten minutes.

Q. How long after you dropped the anchor could you see 2-D?

A. I never saw it afterwards.

Q. You never saw it after you dropped the anchor?

A. Until after the collision.

Q. Could you see her when you dropped the anchor?

A. No.

* * * * * * * *

Q. After you came to anchor at 10:18 did you hear any bells or signals from other ships in the vicinity?

[fol. 64] A. I still heard the fog bells from the ships anchored below.

Q. Anchored below you?

A. I heard them all morning.

Q. That was below 2-D or above 2-D that you heard the sounds coming from?

A. Below 2-D.

• • • • • • •

Redirect examination.

By Mr. Wolff:

• • • • • • •

Q. Captain, did you notice how far you were from Buoy 2-D after the collision?

A. After the collision?

Q. Yes.

A. Approximately 250 to 300 yards.

• • • • • • •

SVEND MAGNUS ANDREASEN, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. La Brum:

• • • • • • •

Q. On December 20, 1939, were you the master of the steamship "Laura Maersk"?

A. Yes.

• • • • • • •

Mr. La Brum: I now produce the log of the "Laura Maersk" and I will ask leave of the Court to have the particular page photostated. Nobody can read it, it is in Danish.

• • • • • • •

[fol. 65] Cross-examination.

By Mr. Wolff:

• • • • • • •

Q. Now, is this your smooth log?

A. Yes.

Q. And the entries in that book were taken from the rough log, were they not?

A. Partly.

. . . . . .

Q. And the rest of it you put in yourself?

A. From the chart.

. . . . . .

Q. When did you write up this smooth log?

A. The smooth log is written—every entry in the smooth log isn't 24 hours old.

Q. And you wrote up the smooth log, you want us to believe, some time within the 24 hours of the date of the entries for that time?

A. Before 24 hours has gone.

. . . . . .

Mr. La Brum: In order that you may have the record complete, may I hand the captain the chart on which he at all times marks his various courses, and times when he passes certain positions?

Direct examination (Continued).

By Mr. La Brum:

Q. Isn't that correct, you use this chart? Is this the chart you used on the way down the Delaware River?

A. That is the chart I used, and that is what I told before, the entries are partly from the old log and partly from the chart.

. . . . . .

Q. At the time you cited the "Bohemian Club" where was the Buoy 1-D in reference to your ship?

A. About at right-angles to the starboard on the after part of our ship.

[fol. 66] Q. At that time how far away was the "Bohemian Club" from you?

A. A ship's length, about, from bow to bow.

. . . . . .

Cross-examination.

By Mr. Wolff:

* * * * * * *

Q. Captain, take your smooth log, please. Look at your smooth log. Does that show you passed Deepwater Point at 11:15 A. M.?

A. Yes.

Q. All right. Will you please point to the chart, Libellant's Exhibit 1, and show me where the point on Deepwater was where you passed at 11:15 A. M.?

(The witness complied.)

Mr. Wolff: The witness indicates the point by making a circle in the channel of the Cherry Island Range with the letter "A" inside the circle.

By Mr. Wolff:

Q. Does you log say you passed the light buoy at New Castle Flats at 11:20 A. M.?

A. Yes.

Q. Will you please point out the light on the New Castle Flats which you passed at 11:20 A. M.?

* * * * * * *

Mr. Wolff: The witness draws a circle in the center of the channel in pencil which is marked with the letter "B".

By Mr. Wolff:

Q. Now, does your log say that at 11:31 you passed the light buoy at Miles Creek?

A. Yes.

Q. Will you point out Miles Creek?

Mr. Wolff: The witness draws a circle in the channel on the Deepwater Point Range marked with the letter "C".

* * * * * * *

[fol. 67] Q. Will you please measure the distance from the point which you have indicated on the chart with the letter "A" as Deepwater Point, and the distance to the point

which you have indicated with the letter "B" as the point which you passed at 11:20?

A. A mile and a half.

Q. Will you please measure the distance from the light buoy at New Castle Flats which you passed at 11:20, and the light buoy at Miles Creek which you say you passed at 11:31?

A. Two and a half.

. . . . . .

Q. . . . Now, Captain, will you please measure the distance from the buoy at Miles Creek to the Buoy 1-D at the lower end of the Deepwater Point Range?

A. It is one mile and one-eighth.

Q. Now, you may take the stand. Captain, your log says that you passed Deepwater Point at 11:15, and you passed the light buoy at New Castle Flats at 11:20, and you have measured that distance as one and a half miles. So, it would follow, would it not, that you were going a mile and a half in five minutes?

A. Yes.

Q. That would be going at the rate of how many knots per hour? And, of course, these are all nautical miles. Tell me how many knots per hour that would make?

A. I don't know.

. . . . . .

A. I can't figure it out when I haven't got fractions of minutes.

. . . . . .

By the Court:

Q. Did you testify, Captain, you went a mile and a half in five minutes?

A. No.

[fol. 68] Mr. Wolff: He has given in his log the time when he passed one point and the time when he passed the second point, and he said the distance between those two points is a mile and a half. Therefore, he went a mile and a half between the times.

The Court: Five minutes?

Mr. Wolff: Yes.

The Court: Now you are asking him to calculate something.

Mr. Wolff: Yes.

The Court: Why don't you calculate it and ask him whether it is correct?

Mr. La Brum: He said he wasn't using fractions of minutes. It makes quite a difference.

Mr. Wolff: We will find out about that.

Mr. La Brum: That is what I want you to do, but do it properly.

The Witness: 18 knots.

. . . . . .

By Mr. Wolff:

Q. Captain, you have also testified that your log shows that you passed the light buoy at New Castle Flats at 11:20 A. M., and you passed the light buoy at Miles Creek at 11:31, and you have given me a distance between those two buoys as two and a half miles?

A. Yes.

Q. At that rate you were going at how many knots per hour? On the basis of those figures you were going how many knots per hour?

A. 13.6.

Q. It would be 13 plus, wouldn't it?

A. 13.6.

Q. Yes, a little over 13½.

. . . . . .

[fol. 69] Q. Is it correct, then, to say that whenever it was you saw that buoy, you reached it at 11:35?

A. Yes.

Q. You reached 1-D at 11:35?

A. Yes.

Q. And you passed the light buoy at Miles Creek four minutes before that, at 11:31, according to your log; that's right, isn't it? According to your log, is that correct?

A. That is correct, not using fractions of minutes.

. . . . . .

Q. And you gave me the distance between the buoy at Miles Creek and the Buoy D-1, which you said you reached

at 11:35, as one and one-eighth miles, didn't you? Please calculate it.

The Court: The answer to that is yes, isn't it?

The Witness: Yes.

* * * * * * *

Q. One and one-eighth miles per hour in four minutes, yes, is how many knots per hour?

A. One and one-eighth of a mile in four minutes gives a speed of 16.87.

* * * * * * *

Q. When you passed Deepwater Point at 11:15, according to your log, your engines were going full speed ahead?

A. Yes.

Q. And they were kept full speed ahead until 11:33?

A. Yes.

Q. Were they then put at half and slow speed?

A. Half, slow, yes.

Q. Half slow, there was just one change in the engines from full ahead to half slow?

A. From full, to half, to slow.

Q. And that was at 11:33, according to your log?

A. Yes.

[fol. 70] Q. And it was at 11:34, according to your log, that the engines were stopped, is that correct?

A. Yes.

Q. Do you know that to be a fact of your own personal knowledge?

A. Yes.

Q. Can we then take it as a fact within your own personal knowledge that the engines were not stopped until 11:34?

A. Yes.

Q. And that they had been going full ahead until 11:33?

A. Yes.

* * * * * * *

By Mr. Wolff:

Q. Captain, I show you what I understand from counsel is the engine room log. Does that contain the bells that were given from the bridge to the engine room?

A. Yes.

Q. Begin with 11:10.

A. 11:10, yes.

Q. Wait a moment. 11:10, what was the signal?

A. Of course, I will point out——

Q. Just answer my question. Have you read from the engine room log what it says? What does that say at 11:10?

A. 11:10, full ahead; 11:29, half-slow; 11:31, stopped; 11:32, full astern; stopped.

Q. Are there two entries for 11:32?

A. They are in between; we are not using fractions.

Q. 11:32, full astern, the next is stop?

A. Stop. 11:33, full astern; 11:34, stopped, full astern between 33——

Q. What is the one after 11:34?

A. 11:37, stop; 11:38, full astern; 11:39, stop; full ahead; 11:41, slow ahead.

Q. That was after the collision, was it?

[fol. 71] A. The collision was between 33 and 34.

Q. Does it say so in the log?

A. Yes.

. . . . . .

Q. Please look at your engine room log and just tell me whether that engine room log gives the time of the collision.

A. It gives a time shortly after 11:33, with a correction on the right side of the watch in the engine room by four minutes ahead.

. . . . . .

Q. Did you say the "Laura Maersk" was swinging when the "Bohemian Club" came into view?

A. Yes.

Q. How was she swinging?

A. To the port, or to the left.

. . . . . .

HARRY L. LYONS, recalled.

Direct examination.

By Mr. Wolff:

Q. Mr. Lyons, you have been sworn. When the "Bohemian Club" anchored at 7:41 on the morning of December 20, 1939, did she give any indication other than by sounding her fog bell that she was a vessel at anchor?

A. Yes, sir.

Q. What did she do?

A. Hoisted the anchor ball.

Q. What is the anchor ball?

A. The anchor ball is a black ball two feet in diameter.

. . . . . .

Q. And when was it put up?

A. 7:41, just as the anchor went down.

Q. And how long did it remain up?

A. To my knowledge, it remained up all the time we were at anchor.

[fol. 72] Q. Until after the collision, you mean?

A. Yes, sir.

Q. Where was it placed, by the way?

A. It was made fast to the fore top mast stay on a pulley by a halyard.

Q. Fore part of what?

A. Fore top mast stay.

Q. That is on the forward mast?

A. Yes, sir.

. . . . . .

Cross-examination.

By Mr. La Brum:

. . . . . .

Q. What did you do with it during the period from 10:13 to 10:18 when you were under way?

A. She was pulled down for that interval.

. . . . . .

Redirect examination.

By Mr. Wolff:

Q. It was up the entire period you were at anchor?
A. Yes.

HENRY EUGENE ROWE, recalled.

Direct examination.

By Mr. Wolff:

. . . . . .

Q. Did you see this black ball run up?
A. Yes, sir.
Q. When?
A. 7:41, the first time.
Q. And where was it run up? To what?
A. On a halyard specially rigged for that purpose on the forecastle head, which was attached to the fore top mast stay.
Q. What was the size of that ball?
A. Two feet in diameter.
[fol. 73] Q. How long did it remain up, do you know?
A. It remained up until 10:13, and then was dropped again at 10:08, and then was hoisted again at 10:18.
Q. Then it remained up?
A. Until we hove up anchor at 12:03 when we proceeded up the river.

. . . . . .

DERRICK LINGO, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. La Brum:

Q. Captain Lingo, are you a Delaware River pilot?
A. Yes, sir.

. . . . . .

Q. Were you the Delaware River pilot assigned to the "Laura Maersk" on December 20, 1939?

A. Yes, sir.

. . . . . .

Q. What was the condition of the weather when you arrived at or passed Buoy 4-D?

A. When we passed 4-D the weather was hazy. On the western side it was just a little haze, and over on the eastern side of the shore down below it was sort of heavy.

. . . . . .

Q. After you passed 1-D, what order did you give to the quartermaster?

A. I told him to put the wheel hard left.

Q. Then what was the next movement, if you recall, of your engines?

A. Full astern.

Q. What happened? What was the next movement?

A. Then we stopped the engines to listen to see if we heard anything. The reason I stopped was to get the way off my ship. There was a bend there.

Q. Then what happened?

[fol. 74] A. Then we stopped immediately and made the "Bohemian Club" right ahead, and went full speed astern on the engines and blew three whistles.

. . . . . .

Cross-examination.

By Mr. Wolff:

. . . . . .

Q. All right. How far off was she right ahead when you first saw her?

A. Approximately 450 feet; I couldn't swear to that.

Q. About what?

A. Approximately 450 feet; I couldn't swear to that.

Q. 450, you said?

A. It is hard for me to say.

. . . . . .

Q. What did you think the ship would do when you put your engines astern?

A. I thought she would get the way off from her.

Q. What else did you think she would do?

A. Normally, they throw their head to the right.

Q. You thought she was going to go to the right?

A. Yes, but she didn't.

. . . . . .

Q. When you reversed the engines you thought that would throw her head to the right?

A. Yes.

Q. If she did respond in that way and had thrown her head to the right, then you would have cleared the "Bohemian Club," wouldn't you?

A. No, sir.

Q. Why not?

A. Too close.

. . . . . .

The Witness: I would have to explain that because I passed 1-D before. I saw the "Bohemian Club," I put the wheel hard left, hard aport.

[fol. 75] By Mr. Wolff:

Q. Before you saw the "Bohemian Club"?

A. Yes, full speed astern. Then I stopped her for a minute, just a second, we will say; anyway, momentarily stopped her to listen to see if I could hear anything. Just at that time the "Bohemian Club" loomed up 450 feet away and I heard the danger signal. It would have been impossible to do anything else under those circumstances.

. . . . . .

Q. Do you remember testifying before the inspectors as follows:——

. . . . . .

"Q. Did it throw you to the left?

A. What little bit there was must have been to the right three or four degrees."

Then your ship did turn to starboard three or four degrees, didn't it?

A. I suppose so, if I said it there.

. . . . . .

Q. Wait until I put the question. When you saw the "Bohemian Club," you had your rudder to port?

A. That is correct?

Q. You immediately put your engines full speed astern?

A. Full speed astern.

Q. And you thought that would turn your heading to starboard?

A. I thought it would have turned the heading to starboard.

Q. It did actually turn it over three or four degrees to starboard, and if you had put your rudder to starboard it would have thrown you to starboard, and, as you say, it would have put you aground?

A. Yes.

. . . . . .

[fol. 76] Q. According to the ship's deck log you passed the light buoy at Miles Creek at 11:31. Is 4-D the light buoy at Miles Creek?

A. 4-D?

Q. Yes.

A. The light buoy off Miles Creek.

. . . . . .

Q. And you were at 4-D at Miles Creek, and you say it was hazy on the easterly side, it was foggy on the easterly side?

A. Rather thick.

. . . . . .

Q. Then, Captain, you can't tell us what your speed was when you got to 1-D, can you?

A. Not exactly, no; it is impossible.

. . . . . .

Q. You can't say the "Bohemian Club" wasn't sounding her fog bell; all you can tell us is you didn't hear it?

A. I didn't hear it, that is correct.

Q. And you attributed that to the atmosphere?
A. The atmosphere, I don't know.
Q. That is what you told the inspectors.
A. That is what I said then, the atmosphere.
Q. And by the atmosphere you meant the foggy and misty, hazy conditions?
A. Other waves blot it out, you can hear something and then you won't. You can't tell.

. . . . . .

A. How much time elapsed from the first time I sighted her?
Q. Until you hit.
A. Very short time.
Q. What was it?
A. I can't say; very, very short. I had no time; I didn't time it, I couldn't say.

. . . . . .

[fol. 77] K. KRAEMMER, having been duly sworn, was examined and testified as follows:

Direct examination.

. . . . . .

By Mr. La Brum:

Q. Now, Mr. Kraemmer, are you the third officer of the "Laura Maersk"?
A. Yes, I am.

. . . . . .

HANS NAUR, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. La Brum:

. . . . . .

Q. Were you on December 20, 1939, an able-bodied seaman on board the "Laura Maersk"?

A. Yes, sir.

• • • • • • •

Q. How long, if at all, were you at the wheel that day?

A. I think I was from about 9:30 until 12:00 o'clock.

• • • • • • •

Q. During the time that you were navigating down the river and just before you came to 1-B, were any fog signals blown, if you know?

A. Oh, they were blowing fog signals all the way down.

• • • • • • •

Cross-examination.

By Mr. Wolff:

Q. Mr. Naur, you say you had been blowing fog signals all the way down? From where do you mean?

A. From the time I came to the wheel.

Q. What time did you go to the wheel?

A. It was about 9:30.

Q. And fog signals were blown how often?

[fol. 78] A. It depends on the weather conditions. There was a time when the engines were going full ahead, then they didn't blow them so often, but they did blow them.

Q. But they did blow them?

A. Yes.

Q. How frequently?

A. You mean at the time we were going full ahead?

Q. Yes.

A. Oh, I should say maybe there was two minutes between.

Q. And except for that, they were blowing them all the time, were they?

A. Yes, I think once a minute.

• • • • • • •

Q. Do you know where buoy 4-D is?

A. Yes.

Q. Do you remember passing Buoy 4-D?

A. Yes, sir, I remember that.

Q. On which side of you was that?
A. On the port side.
Q. Were you looking down the river at that time?
A. Yes, I was looking all over.
Q. You were looking down the river?
A. Yes.
Q. Could you see anything ahead of you?
A. I don't remember.
Q. If you had seen anything ahead of you you would remember, would you not?
A. I am not sure.

* * * * * * *

E. O. LORENTZEN, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. La Brum:

Q. Mr. Lorentzen, what is your position?
A. I am fourth engineer.
[fol. 79] Q. Were you fourth engineer on the "Laura Maersk" on December 20, 1939?
A. Yes, I was.

* * * * * * *

By Mr. La Brum:

Q. Look at your engine room log, and tell us what the movements of both your port and starboard engines were from 11:31 until, say 11:45 or thereabouts.
A. For the starboard engine, 11:31 we had a stop, and 32 we had full astern and stop.

Mr. Wolff: Not so fast, please.

By Mr. La Brum:

Q. Just take it easy.
A. Full astern and stop at 11:32, and at 33 full astern, and then came the collision; at 34 we had stop and full astern, at 37 stop, 38 full astern.

Q. That is sufficient. Will you look at the movements prior to 11:31; going backward, what is the first movement around 11:00 o'clock?

A. 11:00 o'clock, we have a movement at 10:59 slow. then comes 11:10 full ahead, and 11:29 half-speed ahead, and then slow ahead.

Q. I ask you to tell me whether or not at twelve o'clock noon that day your logs were checked, and whether there was noted any difference in time between your clock, your engine room clock and the deck or bridge clocks?

A. At twelve o'clock we checked the clocks and there was a difference of four minutes; the engine room clock was four minutes too late, we put it four minutes ahead.

Q. It was four minutes slow?

A. Yes.

* * * * * * *

Cross-examination.

By Mr. Wolff:

Q. Mr. Lorentzen, did you make the entries in this rough log?

A. Yes, I did.

[fol. 80] Q. You were on watch at the time?

A. Yes.

Q. Did you have a clock there?

A. Yes.

Q. And you looked at the clock?

A. I did.

Q. So that the entries are absolutely correct, are they?

A. No, I couldn't say absolutely correct; we don't make it in fractions.

Q. You don't make it in fractions?

A. No.

Q. Do you take the nearest minute?

A. Yes, we do.

* * * * * * *

Q. Then the times which you have in your log are correct within a half a minute?

A. What?

Q. These times in your log are correct within a half a minute?

A. I should say so.

Q. You say your clock at noon was found to be four minutes slow?

A. Yes.

Q. Then the signal full ahead at 11:10 was given at 11:14, is that it?

A. Yes.

• • • • • • •

Q. Give me the signals for the port engine starting about 11:00 o'clock.

A. 10:59, slow.

Q. What was the one before?

A. 10:58 full ahead.

Q. On your starboard engine you began with what, 10:50 or 10:59?

A. 10:59.

Q. What was your last previous signal?

A. On the starboard engine?

[fol. 81] Q. Yes.

A. It was slow at 10:59.

Q. 10:59 you said was slow?

A. Yes.

Q. What was the one just before that?

A. It was 10:58 full ahead.

Q. Go ahead with your port engine, beginning with 10:58.

A. 10:58, full ahead; 10:59, slow ahead; 11:10, full ahead.

Q. Yes.

A. 29, half ahead and slow ahead; 31 stop, 32 full astern and stop; 33 full astern; and then came the collision. Then we have 34 stop, full ahead; 36 stop, 37——

Q. Never mind that. Where is there any difference between the port and startboard?

Mr. La Brum: There isn't any.

• • • • • • •

MEYER A. M. MATHIASEN, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wolff:

Q. Captain, what is your present occupation?

A. Superintendent of operations, Pennsylvania Shipping Company.

• • • • • • •

Q. Are you a licensed navigator?

A. I am.

Q. What papers do you hold?

A. Master of oceans, and a pilot's license for most waters between Boston, Massachusetts, to Corpus Christi, Texas.

Q. Do you hold a pilot's license for the Bay and River Delaware?

[fol. 82] A. I do.

Q. How long have you been following the sea, Captain?

A. Since 1906.

Q. And what types of vessels have you operated or navigated?

A. Most all kinds of vessels.

Q. Double-screw, twin-screw, as well as single-screw vessels?

A. Yes.

• • • • • • •

Q. Captain, when a vessel's engines are put half-ahead from full ahead, does she immediately reduce her speed, or does an interval elapse?

A. There is an interval.

Q. During that interval what takes place with respect to the speed of the ship?

A. The same speed, the ship travels at the same speed for a certain length of time.

Q. When her engines are stopped from half-ahead does the vessel immediately respond to the stopped engines?

A. No.

Q. Or does she continue ahead?

A. There is a time interval.

• • • • • • •

GEORGE A. WALKER, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wolff:

Q. Mr. Walker, were you chief engineer on the "Bohemian Club" on December 20, 1939?
A. Yes, sir.
Q. You stand no regular watch?
A. No, sir.

. . . . . .

[fol. 83] Q. On this morning of December 20, before this collision occurred, what was the boat doing; was she under way or anchored?
A. She was anchored.

. . . . . .

Q. Do you recall what the weather conditions were when she did anchor?
A. It was very foggy.

. . . . . .

Q. Did it continue to be foggy all through the morning?
A. Yes, sir.

. . . . . .

Q. Now, Mr. Walker, do you know whether or not the bell which is on the "Bohemian Club" today is the same bell which she had on December 20, 1939?
A. I know it's the same bell.

. . . . . .

Q. Can you give us the diameter of the bell at the base?
A. The diameter of the bell at the base is 15 1/16 inches.
Q. You measured that yourself?
A. Yes, sir.

. . . . . .

Q. What is it made of, what kind of material?
A. Yellow bell metal.

Q. By yellow bell metal, you mean what?

A. It is a composition metal, it is similar to brass or bronze. There are several different formulas for making it.

• • • • • • •

Q. Just where is the bell located?

A. The bell is located on the forecastle head.

Q. The forecastle head is the topmost portion of the bow of the ship?

A. Yes.

• • • • • • •

[fol. 84] Q. How high is that bell above the deck or the forecastle head?

• • • • • • •

A. 67¾ inches from the deck to the bottom of the bell.

Q. And it is supported how?

A. It is supported on a steel stanchion, bent in the shape of a davit.

Q. How did the bell sound? Does it have a clapper inside?

A. It has an iron clapper. The bell is alive, I sounded the bell and it is alive.

• • • • • • •

[fol. 85] IN UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT

APPENDIX TO APPELLANT'S BRIEF

DOCKET ENTRIES

June 28, 1940.	Libel filed.
June 28, 1940.	Aattachment exit—returnable July 5, 1940.
June 28, 1940.	Libellant's stipulation for costs in $250., with Indemnity Ins. Co. of N. A. surety filed.
July 1, 1940.	Notice of motion by respondent to set aside process and affidavit in support of motion filed.
July 1, 1940.	Stipulation of counsel as to custody of vessel, etc., and Order of Court ap-

proving stipulation and continuing hearing sur motion to set aside process, filed.

July 17, 1940. Claim filed.

July 17, 1940. Claimant's stipulation for costs in $250., with Indemnity Inc. Co. of N. A. surety filed.

Oct. 3, 1940. Order to place case on Trial List filed.

Oct. 8, 1940. Answer to libed filed.

Oct. 8, 1940. Cross-Libel filed.

Oct. 8, 1940. Attachment exit—returnable October 18, 1940.

Oct. 21, 1940. Answer to Cross-Libel filed.

Nov. 9, 1940. Attachment on cross-libel returned "Service accepted" with directions to Clerk to enter appearance of Lewis, Wolff, Gourlay & Hemphill, Esqs., for cross-respondent & filed.

[fol. 86]

Nov. 9, 1940 Claim of Atlantic Refining Co., to steamship "Bohemian Club" filed.

Nov. 9, 1940. Cross-Respondent's bond for Costs in $250., with Indemnity Insurance Co. of N. America surety filed.

Nov. 9, 1940. Stipulation for Value by cross-respondent in $17,700.00 filed.

Nov. 14, 1940. Trial—witness sworn.

Nov. 15, 1940. Trial resumed.

Nov. 18, 1940. Trial resumed.

Nov. 19, 1940. Deposition of Wm. T. Crescenzo filed.

Nov. 19, 1940. Deposition of Thos. E. Stribling filed.

Nov. 19. 1940. Deposition of Geo. Kevolic filed.

Nov. 19, 1940. Trial resumed.

Nov. 20, 1940. Trial resumed.

Nov. 22, 1940. Trial resumed.

Nov. 25, 1940. Trial concluded. Argument date to be fixed.

Jan. 14, 1941. Testimony filed. (2 vol.)

Mar. 31, 1941. Depositions of J. W. Vickers, et al., filed.

Mar. 31, 1941. Argued sur pleadings and proofs.

Apr. 16, 1941. Requests for findings of fact and conclusions of law, of Claimant & Cross-Libellant, filed.

Sept. 10, 1941.	Opinion, Bard J., granting decree in favor of Libellant and dismissing cross-libel filed.
Dec. 2, 1941.	Interlocutory decree in favor of libellant and dismissing cross-libel filed.

[fol. 87]

Dec. 17, 1941.	Petition of respondent and cross-libellant for appeal filed.
Dec. 17, 1941.	Order of Court allowing appeal filed.
Dec. 17, 1941.	Assignments of error filed.
Dec. 17, 1941.	Citation issued.
Dec. 17, 1941.	Notice of Appeal filed. 12/17/41 Copy to Otto Wolff, Jr.
Dec. 17, 1941.	Bond for costs sur appeal in $250., with Fireman's Fund Indemnity Co., surety filed.
Dec. 19, 1941.	Citation returned: "service accepted" and filed.
Jan. 20, 1942.	Stipulation of counsel as to contents of record on appeal, filed.
Jan. 20, 1942.	Order of Court extending time for filing record on appeal to February 15, 1942, filed. Copy to Circuit Court.
Feb. 9, 1942.	Order of Court extending time for filing record on appeal to Mar. 6, 1942 filed.

[fol. 88] EXCERPTS FROM NOTES OF TESTIMONY

HENRY EUGENE ROWE, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wolff:

Q Captain, on December 20, 1939, were you the master of the tank "Bohemian Club"?

A. Yes, sir.

. . . . . .

Q. How long did you remain at the point where you anchored at 7:41?

A. I laid there until 10:15, about.

Q. What did you do then? What happened at 10:15? That is 10:15 A. M.?

A. Yes. At that time I could see the 2-D Buoy close, about 150 feet away, and I decided to shift the ship.

Q. You say you saw Buoy 2-D 150 feet away, in which direction?

A. About 45 degrees on the starboard bow.

Q. On your starboard bow?

A. On my starboard bow, yes.

• • • • • • • •

Q. What did you do about 10:15, Captain, in the way of changing your position?

A. I put the engines on stand by——

Q. You did what?

A. Put the engines on stand by, hove up the starboard anchor, put the engines half-speed ahead, my rudder to starboard to counteract the set of the current——

Q. The tide was running out [how] flood or ebb?

A. The tide was ebb, which tended to send me to the southwestward in the center of the channel.

• • • • • • •

[fol. 89] Q. Approximately when did the tide change from ebb to flood?

A. About three hours later.

• • • • • • •

Q. After you dropped your anchor the second time was the Buoy 2-D still visible?

A. No, sir.

Q. Were any other channel markings visible?

A. No, sir.

• • • • • • •

Q. What were the weather conditions when you shifted your position at about 10:15 that morning?

A. The fog had cleared slightly, the visibility was about 200 feet, and then shut in again.

• • • • • • •

Q. Did any vessels pass you while you were at anchor, at any time from 7:41 that morning until the time of this collision, either up or down the river?

A. Yes, sir.

Q. Can you tell us what vessels passed you, and approximately what time?

A. The "White Flash" or the "Franklin" passed about 9:45 and the other one around 10:00.

Q. You say the "White Flash" or the "Franklin"?

A. Yes, sir. I don't know which one it was, now.

Q. I asked you, approximately when?

A. One about 9:45 and the other about 10:00 o'clock.

Q. You mean the "White Flash"——

A. Bound down the river.

Q. And the "Franklin"?

A. And the "Franklin".

Q. One or the other of those vessels passed you at 9:45 A. M., or when?

A. Or 10:00 o'clock, about 10:00, yes, sir. I don't remember which one passed first.

Q. How far off were they when they passed you?

[fol. 90] A. I should say about 200 feet.

Q. Do you recall any other vessel having passed?

A. Yes, there was a Finnish ship went by.

Q. About what time was that?

A. That was between the time the "White Flash" went down and the "Franklin".

Q. And how far off, approximately, was she when she passed?

A. She was about the same distance, in the range of visibility.

Q. That is about 200 feet?

A. Yes.

Q. On which side did the "White Flash," the "Franklin," and the Finnish ship pass you?

A. On my port side, all of them upon the right-hand side of the channel, going down.

Q. They passed you on your port side?

A. Yes, sir.

Q. And you were headed upstream?

A. I was headed up.

Q. Did any other vessels pass you at any time from then until the collision occurred?

A. No, sir.

Q. When they passed you, you said the visibility was about what?

A. About 200 feet.

Mr. Wolff: Cross-examine.

Cross-examination.

By Mr. La Brum:

. . . . . .

Q. You say it lightened up about 10:00 o'clock?

A. Until the visibility was about 200 feet.

Q. The visibility was about 200 feet at 10:00 o'clock?

A. About that time when it lightened up.

Q. And what did you do at that time?

A. I got ready to shift the ship away from 2-D in order that I wouldn't foul the——

[fol. 91] Q. What made you decide to slip [shift] the ship away from 2-D?

A. When the tide started to flood——

Q. When the tide started to what?

A. When the tide started to flood, there was a possibility that I would swing around and foul the buoy.

Q. How long after 10:00 o'clock would the tide start to flood?

A. It was still ebb when I got underway about 12:03.

Q. And you are familiar with the tides in the Delaware River, aren't you?

A. Yes, sir.

Q. As a pilot, it would be necessary for you to be familiar with them?

A. Yes, sir.

Q. You had a tide table on board, did you?

A. Yes, sir.

Q. Did you consult the tide table to find out what time the tide would flood?

A. Always do.

Q. And you consulted it on that particular day?

A. No, I don't remember.

Q. You didn't consult it on that particular day?

A. I consulted it, but I don't remember.

Q. But you do know you laid there two hours and three minutes later, and the tide was still ebbing, is that true?

A. Still ebbing.

Q. Now, you say it cleared up about 10:00 o'clock?

A. No, it didn't clear up, it lightened up.

Q. It lightened up?

A. Yes.

Q. Correct me if I am wrong. It lightened up about 10:00 o'clock, and then what did you do when it lightened up?

A. I shifted my ship clear of the buoy.

Q. What made you shift your ship?

[fol. 92] Mr. Wolff: I think he told us that several times, if Your Honor pleases.

Mr. La Brum: I want to find out. He hasn't fixed the buoy yet. I am trying to find out if he could see the buoy, and that is the reason he shifted the ship.

The Witness: I seen this Buoy 2-D on my——

By Mr. La Brum:

Q. That is 2-D, "A", "B", "C", "D"?

A. "D" on my starboard bow about 150 feet away, as near as I could judge, and bearing about four points, four to five degrees, and then I decided to shift the ship, in case the ship swung with the flood tide I wouldn't foul the buoy, I would clear it.

Q. Through your familiarity with the tide tables you knew at least two hours, possibly three hours would pass before you would have flood tide, is that correct?

A. That is correct.

* * * * * * *

Q. What was the position of the ship after you had dropped your anchor?

A. I didn't know that until after the collision.

Q. Then you say you didn't know your position until after the collision?

A. After the collision.

* * * * * * *

Q. You didn't know whether you were in the channel or where you were?

A. Oh, yes——

Q. You knew you were in the channel, you were sure of that, is that——

Mr. Wolff: Let him finish his answer.
What were you going to say, Captain?

By Mr. La Brum:

Q. Finish your answer. You were sure you were in the channel?

[fol. 93] A. I was sure I was in the channel.

Q. At the time you dropped back there before the collision?

A. Right.

Q. That is the only thing you were sure of, and you were sure, also, that you were far enough in the channel away from the buoy to keep from fouling the buoy in the event of flood tide?

A. That's right, with the use of my engines.

. . . . . .

Q. So that all you did as far as your position was concerned was to go further out into the channel away from the buoy?

A. That's right.

. . . . . .

Q. Now, Captain, all ships which passed you, including the "White Flash," the "Franklin" and the Finnish ship, passed you prior to making the change in position, did they not?

A. Yes.

Q. And they were about 200 feeet off your port bow?

A. That's right.

Q. Nothing else passed you after that between 10:18 and the time of the collision?

A. No.

. . . . . .

THORVALD J. NORDSKOG, having been duly sworn, was examined and testified as follows:

. . . . . .

Cross-examination.

By Mr. La Brum:

Q. Captain, you say that you are the captain of the motor ship "Franklin"?

A. That's right.

[fol. 94] Q. And who owns and operates that boat?

A. Atlantic Refining Company.

• • • • • • • •

Q. I believe you said you passed the "Bohemian Club" at 9:45, is that correct?

A. That's right.

Q. I believe that you also said you passed her port to port.

A. That's right.

Q. And that she was about 200 feet off your starboard bow?

A. That's right.

Q. What was the visibility at that time?

A. Just about 200 feet.

• • • • • • • •

Q. Captain, I think you said in direct examination that in your opinion it wasn't safe to navigate above 2-D, going toward the City of Philadelphia, is that correct?

Mr. Wolff: For the "Bohemian Club," he said.

By Mr. La Brum:

Q. All right, the "Bohemian Club;" is that correct?

A. That is correct, at the time.

Q. Was it safe for you to navigate above there?

A. It was until I got there.

Q. It was until you got to 2-D?

A. Yes.

Q. But it was plenty safe until you got to 2-D, wasn't it?

A. Yes, it was.

• • • • • • • •

Q. Didn't you also consider the question that you were in a bend and didn't that have something to do with your proceeding further in order to find a safe anchorage?

A. No, sir, I had passed the bend.

Q. But 2-D is in the bend, isn't it?

[fol. 95] A. That's right.

Q. I am talking now about 2-D. You passed the bend, you came in the fog at 2-D and you heard these bells?

A. Yes, sir.

Q. And you didn't anchor, you proceeded further down the river?

A. Yes, sir.

Q. Is that correct?

A. That's right.

Q. And one of the questions was, was it not, that you didn't want to anchor in the bend?

A. No, sir, I never anchor in the channel.

* * * * * * *

HURD Q. DOWN, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wolff:

Q. Captain, what was your employment on December 20, 1939?

A. Captain of the "M. S. White Flash".

* * * * * * *

Cross-examination.

By Mr. La Brum:

Q. Captain, did you say that the "White Flash" was owned and operated by the Atlantic Refining Company?

A. Yes, sir.

* * * * * * *

Q. You say you passed the "Bohemian Club" at approximately 10:00 A. M.; how far off from the "Bohemian Club" were you when you passed her?

A. It was between 150 and 200 feet. Of course, that is just judging.

* * * * * * *

[fol. 96] Redirect examination.

By Mr. Wolff: —

. . . . . .

Q. Were you looking for an anchorage when you passed the "Bohemian Club"?

A. Looking for an anchorage?

Q. Yes.

A. Yes, I figured on anchoring if the weather stayed in that condition, as soon as I could, off the ranges.

. . . . . .

Henry Eugene Rowe, recalled.

Redirect examination.

By Mr. Wolff:

. . . . . .

— Captain, what time was it when you anchored, according to that?

A. 7.41.

Q. At that time, 7:41, how was the tide running?

A. The tide was flooding.

Q. It had not yet ebbed?

A. No, sir.

Q. What time was it when the tide finally settled down to ebb?

A. At about 9:10.

. . . . . .

Q. When the tide is changing from flood to ebb, what takes place during the interval, and how long does it take for the tide to get set?

A. Anywhere from three-quarters of an hour to an hour and fifteen minutes.

. . . . . .

Q. Now, Captain, turn to your log and tell me how the tide was, your last entry in that log as to the state of the tide prior to 7:41.

[fol. 97] A. The last entry was 1:15 A. M., she swung to flood tide.

Q. She swung to flood tide, and where were you at that time?

A. On the lower end of Liston Range.

Q. How long would it take the tide to change?

A. Approximately six hours.

Q. Would there be a difference between the time it changed at Liston's Point and the time at which it would change on the Bulkhead Bar Range?

A. Yes, sir.

Q. About what would be that difference?

A. An hour and a half, approximately.

Q. From that, can you account for the headings of your ship from 7:41 until 9:10?

A. Yes, sir, that shows the flood of the tide was still flooding.

* * * * * * *

Re-cross-examination.

By Mr. La Brum:

* * * * * * *

Q. You anchored, you said, at 7:41 that morning, approximately 150 feet off Buoy 2-D; it was then flood tide, wasn't it?

A. I don't know how far I was when I anchored, I couldn't see the buoy.

Q. But at ten o'clock you found you were approximately 150 feet off?

A. On the ebb tide, yes, sir.

Q. But you knew that you had anchored at 7:41 A. M.?

A. That was the time I anchored.

Q. And it was flood tide then?

A. Yes.

* * * * * * *

Q. And you knew at flood tide you were swinging on the other side of the buoy, didn't you?

[fol. 98] A. To the left of it.

Q. Had you fouled it?

A. No, I swung away from it.

Q. You swung away from it on flood tide at that time?

A. Yes.

* * * * * * *

Q. When did the tide change after 7:41?
A. At 8:40 the tide had started to ebb.
Q. That is an hour later?
A. Almost an hour later. She had started to swing at 8:20.
Q. The boat had started to swing?
A. She had started to swing with the ebb tide at 8:20, this position here (indicating).

* * * * * * *

Q. On this chart which you have marked Libellant's Exhibit 10, you placed your boat at 10:13 before you lifted your anchor, is that correct?
A. Yes, sir.
Q. Now, place your boat on this chart at the time the anchor had been lifted and you had shifted to your new position. * * *

* * * * * * *

(The witness complied.)

* * * * * * *

Q. So, the effect on your ship was just to bring your boat further out into the channel, wasn't it?
A. That's right.
Q. Further away from the buoy and further out into the channel?
A. Yes.

* * * * * * *

[fol. 99] Richard H. Dunphe, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wolff:

Q. Mr. Dunphe, were you the second officer on the "Bohemian Club" on December 20, 1939?
A. Yes, sir.

* * * * * * *

Q. Mr. Dunphe, can you explain to us what happens when the tide changes from flood to ebb? First of all, is that a sudden change, and if not, what takes place?

A. No, it isn't a sudden change; it is a very gradual change.

Q. During the course of that change what takes place?

A. The flood tide to ebb, you say?

Q. Yes.

A. The force of the flood tide will gradually diminish and you will have a period of slack water.

Q. What do you mean by a period of slack water?

A. When there is no tide at all.

* * * * * * *

DERRICK LINGO, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. La Brum:

Q. Captain Lingo, are you a Delaware River pilot?

A. Yes, sir.

Q. How long have you been a Delaware River pilot?

A. 12 years.

Q. During the period that you have been a Delaware River pilot, how many boats, approximately, have you piloted up and down the Delaware River?

A. Twelve to fifteen hundred.

Q. Were you the Delaware River pilot assigned to the "Laura Maersk" on December 20, 1939?

A. Yes, sir.

* * * * * * *

[fol. 100] Q. When you sighted the "Bohemian Club," where would you say she was, approximately, in relation to the channel?

A. I would say that she was almost in the bend, in the center of the channel, if anything, a little to the westward.

Q. That is a little to your right side?

A. That's right, yes, sir.

Q. In your opinion, was the place where the "Bohemian Club" was anchored when you sighted her, a safe place for any vessel to anchor?

A. In the bend it is a very bad place to anchor a vessel because if you make a vessel and your ship is swinging, which would have to be, it is much harder to check a vessel on a swing than if you are on a straight course.

* * * * * * *

[fol. 101] IN UNITED STATES DISTRICT COURT

Opinion, Findings of Fact and Conclusions of Law—September 10, 1941

On Pleadings and Proof

BARD, *J.*

On December 20, 1939 the tanker BOHEMIAN CLUB and the motor vessel LAURA MAERSK collided in the Delaware River at the upper end of the Bulkhead Bar Range, while the BOHEMIAN CLUB was lying at anchor. The BOHEMIAN CLUB's bow was damaged. The LAURA MAERSK sustained damage to her stem. The damage to both vessels was well above the water line. The Atlantic Refining Company, owner of the BOHEMIAN CLUB, filed a libel on June 28, 1940, claiming $40,000 damages. A. P. Moller, Managing Owner of the LAURA MAERSK, filed a cross-libel on October 8, 1940, claiming $15,000 damages. The trials on the respective libels were consolidated.

I make the following special

FINDINGS OF FACT

1. The libellant is and was at all times herein concerned a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, and is owner of the steamship BOHEMIAN CLUB.

2. The respondent was at all times herein concerned the managing owner of the motor vessel LAURA MAERSK, a Danish vessel.

3. The steamship BOHEMIAN CLUB is a tanker, 435 feet long over all.

4. The LAURA MAERSK is a motor vessel 483 feet 10 inches long over all.

5. On the morning of December 20, 1939, the LAURA MAERSK was proceeding down the Delaware River from Philadelphia, Pennsylvania, and the BOHEMIAN CLUB was [fol. 102] proceeding up the Delaware River toward Philadelphia with a cargo of crude oil, drawing 27 feet forward and 27 feet 1 inch aft.

6. Both the LAURA MAERSK and the BOHEMIAN CLUB were in charge of pilots licensed for Delaware River.

7. At about 7:30 A. M. on December 20, 1939, the BOHEMIAN CLUB turned off the New Castle Range onto the Bulkhead Bar Range and shortly thereafter encountered a dense fog.

8. After proceeding a short distance, the BOHEMIAN CLUB came to anchor at 7:41 A. M., running out her starboard anchor. There were no anchorages within five miles, and no buoys were then visible.

9. A short while after 10:00 A. M. the buoy 2D, on the easterly side of the channel, at the intersection of the Bulkhead Bar and Deepwater Point Ranges and at the northerly end of the Bulkhead Bar Range, first became visible. When sighted it lay about 150 feet distant at an angle of about 45 degrees off the starboard bow.

10. At this time, the heading of the BOHEMIAN CLUB was approximately 30 degrees.

11. The distance between the Bulkhead Bar Range Line and the easterly boundary of the channel on which buoy 2D is located is about 400 feet.

12. The distance between the Bulkhead Bar Range line and the westerly boundary of the channel is about 800 feet.

13. The tide was ebb at the time buoy 2D was sighted and was due to change to flood approximately two hours later.

14. In order to lie clear of buoy 2D when the tide switched at 10:13 A. M., the BOHEMIAN CLUB lifted her anchor, the engines were put slow ahead and the rudder was put hard right. At 10:15 A. M. the engines were stopped and at [fol. 103] 10:18 A. M. the anchor was dropped, the fog having set in again, obscuring buoy 2D.

15. During the above maneuver, the heading of the ship changed to the westward from 30 degrees to 356 degrees.

16. When the anchor was dropped again, the heading changed eastward to approximately 50 degrees, and shortly thereafter settled again at 30 degrees, which heading was maintained until immediately prior to the collision.

17. The set of the ebb tide where the above maneuver was executed was in a southwesterly direction.

18. The above maneuver located the BOHEMIAN CLUB to the westward, farther into the channel.

19. The master of the BOHEMIAN CLUB did not know the exact position of the ship after the above maneuver, the fog having again obscured buoy 2D.

20. The Deepwater Point Range line extends at approximately a 34 degree angle to the Bulkhead Bar Range line, the two ranges meeting at the Buoy 2D.

21. At 11:35 A. M. the BOHEMIAN CLUB was located in the channel with her bow approximately on the Bulkhead Bar Range line near its juncture with the Deepwater Point Range line, her stern tailing on or to the westward thereof, her heading being 26 to 30 degrees.

22. The heading of the BOHEMIAN CLUB changed to 356 degrees by the hour 11:45 A. M. due to a squall from the westward, which arose at the time of the collision.

23. While at anchor between 10:18 A. M. and 11:45, at which latter time bearings were taken, the anchor was in line with the heading of the BOHEMIAN CLUB, the ship's movements being in an arc with the anchor as fulcrum.

24. A vessel anchored as the BOHEMIAN CLUB was at the time of the collision, on the range line of one range close to the angular juncture of that range with another, is [fol. 104] anchored in such a manner as to present an obstruction to the free passage of other vessels, particularly ones approaching from the other range.

25. The fog obscuring buoy 2D after the BOHEMIAN CLUB moved at 10:13 A. M. did not lift until the time of the collision.

26. While the BOHEMIAN CLUB was anchored at the location taken at 10:18, her master and third officer were sta-

tioned on her bridge, a trained and experienced seaman was on her forecastle head as look-out, a black ball two feet in diameter was attached to her foretop mast stay, and her fog bell located on her forecastle head was rung rapidly for five seconds at minute intervals.

27. The sound of the fog bell on the BOHEMIAN CLUB was not heard by those aboard the LAURA MAERSK.

28. As the LAURA MAERSK proceeded down the Delaware River on December 20, 1939, the weather was alternately hazy and clear, the vessel proceeding slowly at times, and at other times proceeding at normal speed.

29. At 11:20 A. M. the light buoy at New Castle Flats was passed. This buoy lies about 3000 yards below Deepwater Point.

30. At 11:31 A. M. the light buoy number 4D on the Deepwater Point Range was passed. This buoy lies about two and one-half miles below the buoy at New Castle flats. At that time buoy 1D could be seen, but the eastern side of the channel was obscured by fog.

31. Buoy 1D lies about one mile below buoy 4D and marks the point at or near which vessels change course from the Deepwater Point Range to the Bulkhead Bar Range.

32. At 11:33 A. M. the engines of the LAURA MAERSK were reduced to half speed and then to slow ahead.

[fol. 105] 33. At 11:34 A. M., the haze having become denser, the engines of the LAURA MAERSK were stopped, and the vessel was then abreast of buoy 1D.

34. At that time the rudder of the LAURA MAERSK was put hard to port in order to bring her around the 34 degrees left turn into the Bulkhead Bar Range channel.

35. As the above maneuver was begun, fog enveloped the LAURA MAERSK and her engines were put full speed astern. Then they were stopped, in order to listen for signals of other vessels.

36. At the moment the engines of the LAURA MAERSK were stopped, the fog was dispelled or pierced so that the BOHEMIAN CLUB could be seen about 400 feet away.

37. The BOHEMIAN CLUB bore slightly off the port bow of the LAURA MAERSK, but was in her path.

38. When the BOHEMIAN CLUB was sighted, the engines of the LAURA MAERSK were put to full speed astern and she signalled that she was executing that maneuver.

39. The tide at the time of the collision was flowing at a speed of a knot and a half, and a wind or squall from the west had just arisen.

40. The LAURA MAERSK and the BOHEMIAN CLUB collided head on, at about 11:37 A. M. on or about the range line near the upper end of the Bulkhead Bar Range, the stem of the LAURA MAERSK striking the bow of the BOHEMIAN CLUB, both boats suffering damage.

41. The lookout aboard the BOHEMIAN CLUB thought he heard a signal of another vessel immediately before the LAURA MAERSK hove into view. He thereupon rang the fog bell vigorously but got no response from the LAURA MAERSK. Just then the LAURA MAERSK appeared some 400 to 450 feet ahead.

42. When the LAURA MAERSK was sighted by the BOHEMIAN CLUB, a general alarm was sounded, her engines were [fol. 106] put full speed astern, and several sharp blasts were blown on her whistle.

43. Immediately thereafter a westerly wind dispelled the fog in the area.

DISCUSSION

There is a statutory prohibition against anchoring in channels in such a manner as to obstruct the passage of other vessels. Act of March 3, 1899, c 425, § 15, 30 Stat. 1152, 33 U. S. C. A. 409. The BOHEMIAN CLUB anchored in the channel at 7:41 A. M. and moved to another location in the same channel shortly after 10:00 A. M. Although it appears that, where first anchored, the BOHEMIAN CLUB did not present an obstruction to down-river traffic, shortly after anchoring at a different location about 10:18 A. M., the BOHEMIAN CLUB was anchored in the channel in such a manner as to present an obstruction to the passage of down-river traffic.

The prohibition established by the Congress has not been construed as absolute or unreasonable. The Europe,

190 Fed. 475; The Grand Manan, 208 Fed. 583. And, it has been held that a vessel caught in a dense fog may anchor in a channel if that is the least dangerous course under the circumstances and if the statutory signals are given. The City of Norfolk, 266 Fed. 641; The Socony No. 9, 74 F. 2d 233.

In the City of Norfolk, supra, it was held that in case of collision a ship so anchored is entitled to the presumption in favor of a vessel at rest against a moving vessel, if the circumstances justified anchoring in channel. Her position must be justified, however. The Southern Cross, 93 F. 2d 297.

When the BOHEMIAN CLUB anchored in a dense fog at 7:41 A. M., there was no safe anchorage in the vicinity. Even withdrawal to the Eastern edge of the channel was forestalled by the poor visibility at the time. To proceed would have been to subject the ship to greater hazards than [fol. 107] those presented by anchoring, as there were no visible guides to navigation. The "balance of advantage to all concerned" rendered the decision to anchor a wise one. Furthermore, a speed sufficient to enable steering would have been too great to allow the BOHEMIAN CLUB to control herself properly in the event another vessel had been encountered in the fog. I am decided that it was not negligence to anchor the BOHEMIAN CLUB at 7:41 A. M. at the point where she was anchored.

When at 10:00 or shortly thereafter the fog disappeared sufficiently for the buoy 2D to be seen, the master of the BOHEMIAN CLUB concluded that she was in such a position that a change in the tide from ebb to flood would result in her fouling the buoy. That conclusion seems reasonable. The anchor was taken up, the rudder was put hard to right and the engines were put at slow ahead for two minutes. Three minutes after the engines were stopped, the anchor was dropped again, the fog having closed in during the maneuver, obscuring buoy 2D and rendering further movement hazardous. To anchor was the least dangerous course under the circumstances; when fog again enveloped the BOHEMIAN CLUB, it was proper to anchor and give the statutory signals required of a ship.

When the vessel settled behind her anchor in the flow of the tide she was resting with her bow on or near the range line and her stern on or to be westward of the range line.

The captain testified that he maneuvered as he did in order to counteract the flow of the tide, in order to avoid drifting to the westward as he cleared buoy 2D. It is my conclusion that the object of the maneuver was not improper and the execution thereof under the circumstances was not negligence. Though the fog did, in fact, disperse before the direction of the tide switched, there was not any assurance, at 10:00 A. M. that such would happen. The uncontradicted evidence is to the effect that at and between both times the BOHEMIAN CLUB anchored, fog obscured all indicia of position, with the sole exception of the few minutes shortly [fol. 108] after 10:00 A. M. when buoy 2D was visible. This circumstance is of prime importance.

The propriety of decisions made and maneuvers undertaken must be judged with due regard for the fact that there was little time for deliberation and with proper consideration for the prevailing conditions. Captain Rowe concluded that the safest course was to allow the BOHEMIAN CLUB to drift back, with rudder to starboard and engines slow ahead to hold her bow against the force of the tide. It was suggested at the trial and argued later that the BOHEMIAN CLUB should have proceeded around the bend and anchored on the Deepwater Point Range when the fog cleared partially shortly after 10:00 A. M., or should have sought an anchorage outside the Bulkhead Bar Range channel at that time. The former course, though open to the BOHEMIAN CLUB, was hazardous, as the fog might have obscured the buoy, as it did, before the BOHEMIAN CLUB could have negotiated the turn and directed herself to a safe point of anchorage on the eastern side of the channel. The latter course was not open to the BOHEMIAN CLUB because her draft was too great to risk proceeding outside the channel at that point. Furthermore, even assuming the propriety of the suggested courses, it must be remembered that Captain Rowe was required to act immediately, without opportunity to test his conclusions against all considerations and upon conjecture rather than knowledge of subsequent conditions and events. In light of these considerations, I am decided that the position of the BOHEMIAN CLUB at the time of the collision stands justified.

When it became apparent to the BOHEMIAN CLUB that a collision was imminent, a general alarm was sounded, her engines were put to full speed astern and several sharp

blasts were blown on her whistle. In view of the suddenness of the emergency and the short time elapsing between the time when it arose and the collision, it cannot be said that failure to pay out anchor chain was negligence. At [fol. 109] best, such could have eased the impact but slightly. Even though the blasts of her whistle were misleading, since they might have been construed as indicating that the BOHEMIAN CLUB was under way, it does not appear that this affected the measures taken aboard the LAURA MAERSK. Use of the whistle was no doubt prompted by the apparent failure of the bell to warn those aboard the LAURA MAERSK of the impending collision.

The evidence, even aside from any legal presumption in the BOHEMIAN CLUB's favor, supports a conclusion that the LAURA MAERSK was at fault. The speed at which the LAURA MAERSK proceeded down the Deepwater Point Range was excessive under the prevailing weather conditions, and was not sufficiently diminished by the various changes in engine speed and direction which were made just prior to the collision. I am in sympathy with the current trend away from the strict "rule of sight," the rule which requires a vessel to be held at fault by the mere fact that she was unable to come to a standstill within the distance of visibility. But unwillingness to consider that rule entirely adequate and to apply it strictly does not indicate a willingness to sanction proceeding at a speed so great as to prevent a stopping reasonably likely to be required under the prevailing and prospective conditions of visibility.

In the instant case the LAURA MAERSK had a clear view for a considerable distance on the westward side of the Deepwater Point Range, but there was an apparent heavy fog bank lying ahead on the eastward side. Knowledge of the length and direction of the ranges must be imputed to the pilot aboard the LAURA MAERSK. Therefore it was incumbent upon the pilot to regulate the LAURA MAERSK's speed so that she could be maneuvered safely under any reasonably probable circumstance in weather such as that on the day of the collision. The frequent fogginess earlier encountered and the heavy fog lying on the eastward side of the Range dictated a much slower speed than that which was ordered. Not only was there a likelihood that some [fol. 110] ship had been required by the fog to come to anchor, but there was a chance that another vessel under way was hidden in the fog ahead, had lost its course, and

consequently presented a hazard to navigation. Furthermore, the frequent passage from foggy to clear atmospheres was in itself a circumstance suggesting slow speeds.

Clearly, the LAURA MAERSK was proceeding at a speed which was excessive in view of the apparent prevailing conditions. This was a cause of the collision, and the LAURA MAERSK therefore was at fault.

CONCLUSIONS OF LAW

1. Those in charge of the BOHEMIAN CLUB were without fault in anchoring on the eastern side of the upper end of Bulkhead Bar Range at 7:41 A. M.

2. Those in charge of the BOHEMIAN CLUB were justified in moving her shortly after 10:00 A. M., when the fog cleared, and in anchoring her again at 10:18, when the fog again obscured indicia of position.

3. The measures required of a vessel at anchor in fog were taken by those in charge of the BOHEMIAN CLUB after she was anchored at 10:18 A. M.

4. Those in charge of the LAURA MAERSK were negligent in the navigation of the LAURA MAERSK.

5. The collision was a proximate consequence of the negligence of those in charge of the LAURA MAERSK's navigation.

6. The cross-libel filed by A. P. Moller against the BOHEMIAN CLUB must be dismissed, with costs.

7. A decree should be entered in favor of The Atlantic Refining Company, owner of the BOHEMIAN CLUB, for the full amount of damages sustained by reason of the collision, and costs.

So ordered.

[fols. 111-113] IN UNITED STATES DISTRICT COURT

INTERLOCUTORY DECREE—December 2, 1941

AND NOW, to wit, December 2, 1941, the above-entitled causes having come on to be heard on the pleadings and proofs, and having been argued and submitted by the proc-

tors for the respective parties, and the court, after due deliberation having filed its opinion in writing in which it found that the collision between the Tanker "Bohemian Club," owned by the Atlantic Refining Company, and the Motor Vessel "Laura Maersk" was the proximate consequence of negligence on the part of those in charge of the navigation of the "Laura Maersk," and that a decree should be entered in favor of the Atlantic Refining Company, owners of the "Bohemian Club" for the full amount of damages sustained by it by reason of said collision, with costs, and that the cross-libel filed by A. P. Moller, against the "Bohemian Club" must be dismissed with costs;

It is ORDERED, ADJUDGED and DECREED that the libellant, The Atlantic Refining Company, owner of the Tanker "Bohemian Club," recover of and from the Motor Vessel "Laura Maersk," her engines, tackle, apparel, etc., the full amount of its damages arising out of the matters set forth in its libel against the "Laura Maersk," together with interest and costs; and it is further

ORDERED, ADJUDGED and DECREED that the cross-libel of A. P. Moller against the "Bohemian Club" be and the same hereby is dismissed with costs, and that The Atlantic Refining Company, cross-respondent, recover of and from the cross-libellant, A. P. Moller, and Indemnity Insurance Company of North America, his surety, its costs to be taxed by the Clerk of the court, and that The Atlantic Refining Company have judgment therefor against the said cross-libellant and Indemnity Insurance Company of North America, his surety.

(s) Guy K. Bard, J.

[fol. 3] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7970

ATLANTIC REFINING COMPANY, Owner of Tank Steamship "Bohemian Club", Libellant-Appellee,

vs.

MOTOR VESSEL "LAURA MAERSK", Her Engines, Tackle, Apparel, etc., A. P. Moller, Claimant-Appellant

A. P. MOLLER, Managing Owner of the Motor Vessel "Laura Maersk", Cross-Libellant-Appellant

vs.

TANK STEAMSHIP "BOHEMIAN CLUB", Her Engines, Tackle, Apparel, etc., The Atlantic Refining Co., Claimant-Appellee

And afterwards, to wit, the 6th day of May, 1942, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Charles Alvin Jones and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 21st day of October, 1942, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 4] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7970

THE ATLANTIC REFINING COMPANY, Owner of the Tank Steamship "Bohemian Club", Libellant-Appellee,

v.

MOTOR VESSEL "LAURA MAERSK", Her Engines, Tackle, Apparel, etc., A. P. Moller, Claimant-Appellant

A. P. MOLLER, Managing Owner of the Motor Vessel "Laura Maersk", Cross-Libellant-Appellant

v.

TANK STEAMSHIP "BOHEMIAN CLUB", Her Engines, Tackle, Apparel, etc., The Atlantic Refining Co., Claimant-Appellee

On Appeal from a Decree of the District Court of the United States for the Eastern District of Pennsylvania

OPINION—Filed October 21, 1942

Before Biggs, Jones and Goodrich, Circuit Judges.

[fol. 5] JONES, Circuit Judge:

This appeal grows out of a suit in admiralty for the damages to each of two vessels resulting from their collision. The Atlantic Refiining Company, as owner of the one vessel, a tanker (the "Bohemian Club"), filed a libel against the other, a motor ship (the "Laura Maersk"), A. P. Moller, as the managing owner of the "Laura Maersk", filed a cross-libel. The District Court, finding that the "Laura Maersk" was at fault in the manner of her navigation and that the fault so found was the sole cause of the collision, awarded the Atlantic Refining Company damages against the "Laura Maersk", with costs, for the injuries suffered by the "Bohemian Club" and dismissed the cross-libel of Moller with costs to the cross-libellee. Moller and the "Laura Maersk" appeal.

The facts as found by the learned trial judge are as follows:

On the morning of December 20, 1939, the "Bohemian Club" (the tanker) was proceeding up the Delaware River on its way to Philadelphia. From place to place, the navigable channel course veers in order to follow the deeper water. The ranges for the various courses are well identified and plainly marked. At about 7:30 A. M. the tanker entered upon the course indicated by the Bulkhead Bar Range. Shortly thereafter she encountered a dense fog. After proceeding a short distance she dropped anchor at 7:41 A. M. because of the fog. At this time and place no buoys were then visible on account of the weather condition and no ordinary anchorages were available within five miles. Shortly after 10:00 A. M. the fog lifted a little and buoy 2-D on the easterly side of the channel, opposite the intersection of the northerly end of the Bulkhead Bar Range and the southerly end of the Deepwater Point Range, became visible. When sighted, it lay about one hundred fifty feet distant at an angle of forty-five degrees off the tanker's starboard bow. At that time the heading of the tanker was approximately thirty degrees. The tide was ebb but was [fol. 6] due to change in about two hours. The channel at this point is about twelve hundred feet wide, eight hundred feet thereof lying to the west of the range line. Actually the position of the tanker, as anchored, was on the easterly side of the channel, and although the fact was not specifically found by the trial court, the evidence shows that, while the tanker was thus anchored, it was passed safely by three vessels proceeding down the river and that the master of the tanker knew that. Where the courses as indicated by the Bulkhead Bar Range and the Deepwater Point Range intersect opposite buoy 2-D, a vessel in order to change from the one course to the other has to make a 34° turn.

When buoy 2-D became visible about 10:00 A. M., the master of the tanker, fearing that his vessel might foul the buoy when she swung with the tide upon the change to flood, decided to drop his vessel back away from the buoy when the fog had cleared sufficiently for the maneuver. Accordingly, for this purpose, at 10:13 A. M. the tanker's anchor was lifted and her engines were put slow ahead. At 10:15 A. M. her engines were stopped and at 10:18 A. M. her

anchor was dropped, as the fog had again set in to the extent of obscuring buoy 2-D entirely. After this brief maneuver, the master of the tanker did not then know the exact position of his ship. Actually, the result had been to carry the tanker toward the west and thus farther out into the channel. At the time of the collision (to be described) the tanker was located in the channel with her bow approximately on the Bulkhead Bar Range course near the intersection of that course with the Deepwater Point Range course, her stern tailing to the west as her heading was still about thirty degrees. According to the fact as found by the court below, the tanker as finally anchored presented an obstruction to the free passage of other vessels on the Bulkhead Bar Range course, especially those approaching downstream from the Deepwater Point Range course. There was evidence, and the court found, that the tanker [fol. 7] sounded her bell all of the time she was anchored in the fog, as required by the Inland Rules of Navigation (Article 15 (d), June 7, 1897, c. 4, § 1, 30 Stat. 99, 33 U. S. C. A. § 191 (d)).

The "Laura Maersk", which was proceeding down the river from Philadelphia, had successively passed Deepwater Point at 11:15 A. M., the light buoy at New Castle Flats at 11:20 A. M., buoy 4-D at 11:31 A. M., and buoy 1-D (on the westerly side of the channel just above buoy 2-D) at 11:35 A. M. While the learned trial judge made no specific finding, it appears from the testimony of the master of the "Laura Maersk" that she had been making speeds varying from thirteen to eighteen knots an hour between the points above mentioned. At 11:33 A. M. the engines of the "Laura Maersk" had been reduced to half-speed and then to slow ahead, because of the fog which she was entering. At 11:34 A. M. her engines were stopped, as the fog had become denser, and when the vessel was abreast the buoy 1-D the rudder was put hard to port in order to bring the ship around the 34° turn onto the Bulkhead Bar Range course at buoy 2-D. While this maneuver was being executed the vessel's engines were put full speed astern because of the fog enveloping the ship; and then the engines were stopped in order to listen for signals from other craft. The fog bell of the tanker was not heard at any time by those aboard the "Laura Maersk". At this moment the fog was pierced sufficiently to disclose to the "Laura Maersk" a view of the tanker lying about four hundred feet ahead. The en-

gines of the "Laura Maersk" were put full speed astern and she so signalled, but despite her effort, she collided head-on with the tanker at about 11:37 A. M., from which both ships suffered the damages claimed. The tanker had also put her engines full speed astern, when the "Laura Maersk" hove in sight, but as there was no time to pay out her anchor chain, she had remained more or less stationary.

It is the appellants' contention that the position of the "Bohemian Club" at the time of the collision was unlawful and cannot be justified; and that she may not shift the [fol. 8] blame for the collision under the "major and minor fault" rule since her fault was sufficient of itself to account for the collision, while the alleged fault of the "Laura Maersk" is at most no more than a suspicion as to the care exercised in her navigation. The appellee insists that the "Bohemian Club" was free from fault; that the collision was due solely to the fault of the "Laura Maersk" in proceeding in thick weather at an excessive rate of speed; and that under the doctrine of "major and minor fault" any doubt as to the propriety of the "Bohemian Club's" navigation must be resolved in her favor.

This matter is before us *de novo*. See The S. S. Bellatrix, 114 F. (2d) 1004, 1006 (C. C. A. 3) and cases there cited. The trial court found, *inter alia*, that the "Laura Maersk" was navigated, as she approached the change of course opposite buoy 2-D, at what amounted to an excessive rate of speed under the prevailing weather conditions and that the fault in such regard was, "a cause of the collision". We choose to adopt those findings. Independently, we should have found to like effect from the evidence. The liability of the "Laura Maersk" follows as a matter of law.

Art. 16 of the Inland Rules of Navigation (June 7, 1897, c. 4, § 1, 30 Stat. 99, 33 U. S. C. A. § 192) provides in part that "Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions." What is a moderate speed in a given situation must, of course, depend upon the facts of the particular case if regard is to be had for "the existing circumstances and conditions". In The Chattahoochee, 173 U. S. 540, 548, the Supreme Court laid down the rule that a vessel should proceed at such a rate of speed as to be able, upon sighting another vessel, to stop in time to avoid a collision. In the earlier case of The Umbria, 166 U. S. 404, 412, it had been intimated that

what was demanded of a vessel under the "moderate speed [fol. 9] rule" was a slackening of speed to the lowest rate consistent with good steerage. Obviously, this rule calls for discriminating application as, otherwise, the requirement of its spirit might be obviated by the intentional design of ship construction. In short, a ship so constructed that she cannot be navigated at a moderate rate of speed, according to the requirements of the particular situation, navigates at her own risk. The Sagamore, 247 Fed. 743, 749 (C. C. A. 1). In any event, excessive speed in a fog has been held to impose liability. See The Ernest H. Meyer, 84 F. (2d) 496, 504 (C. C. A. 9); the Cherokee, 45 F. (2d) 150, 151 (C. C. A. 2); New York & Cuba Mail S. S. Co. v. United States, 16 F. (2d) 945, 947 (C. C. A. 2). It seems clear to us that those in command of the "Laura Maersk" navigated her in disregard of the requirements of the above rule under the prevailing weather conditions and that the court below properly assigned that fault as "a cause of the collision".

It is our further opinion, however, that the circumstances which attended the collision are incapable of absolving the "Bohemian Club" of liability for contributing to the cause of the collision. As the trial court justifiably found she anchored in the channel "in such a manner as to present an obstruction to the free passage of other vessels, particularly ones approaching from the other range". Her action was a positive violation of a statutory rule which is not to be justified by a necessity resulting from her own deliberate choice of a change of position in foggy weather, unless it be shown that her changed position did not contribute to the collision. That, the evidence fails to disclose.

The Act of March 3, 1899, c. 425, § 15, 30 Stat. 1152, 33 U. S. C. A. § 409, provides in material part that "It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft;* * *" The words "prevent or obstruct" have been held to connote limited restraint rather than absolute or complete prohibition. [fol. 10] The Europe, 190 Fed. 475, 479 (C. C. A. 9); The Caldy, 153 Fed. 837, 840 (C. C. A. 4). In the City of Norfolk, 266 Fed. 641, 645 (C. C. A. 4), cert. den. 253 U. S. 491, the court did say that if a fog becomes so dense that a vessel cannot move safely then she should anchor and give the statutory signals and that, "Even if he [the master] thus

obstructs the channel, he is not responsible, because it is done under necessity." Actually, the latter observation was a dictum, for the court had found that The Norfolk, the moving vessel, would have passed in safety had she been navigated with due care. That finding clearly implied that the anchored vessel did not prevent or obstruct the passage of other vessels. Moreover, that the court did not intend to suggest, in the case of The Norfolk, that all anchorages in channels because of fog excuse violations of the statute is clearly indicated by the further statement (p. 644) that the dominant use of channels is for passage of vessels and not anchorage therein and that the excuse because of necessity does not admit of a vessel's anchoring voluntarily in a channel when her presence there imperils other vessels or requires more than ordinary care or skill in their navigation.

The case of The Socony No. 9, 74 F. (2d) 233, 234 (C. C. A. 2) is distinguishable from the present. While the tanker as anchored in the Socony case did obstruct ferries coming into the rack, it did not constitute an obstruction to the tug which actually collided with her in the fog. Moreover, in that case the anchored vessel would have had to venture into waters crowded with ferries in order to try to find another anchorage. Under the circumstances it was held that she was justified in anchoring where she did. That case would have been of present bearing had the "Bohemian Club" remained at the anchorage which she first made because of the fog. In The Providence, 67 F. (2d) 865, 867 (C. A. A. 2), the anchored steamer was held not to be obstructing the course of the ferry boat which had made three trips in safety, while the steamer lay at the anchorage, and [fol. 11] then collided with her on the fourth trip. Likewise, in The Bailey Gatzert, 179 Fed. 44, 50 (C. C. A. 9) it was held that the dredge as anchored did not prevent or obstruct the passage of other vessels or craft. In The Northern Queen, 117 Fed. 906, 913-915 (W. D. N. Y.) the vessels had anchored in a fairway at a point where it was one-half mile wide and where the navigable channel was four miles wide. In such circumstances, it could be and was held that the anchorage did not obstruct or prevent the passage of other vessels. Such, however, was not the situation in the instant case according to the finding of the trial judge with respect to the tanker's obstruction of the channel with which we fully agree. Where vessels have been anchored so as to

obstruct or prevent the passage of other vessels, it has been held that such anchorages constitute culpable fault. See City of Birmingham, 138 Fed. 555 (C. C. A. 2), cert. den. 199 U. S. 607; The Lehigh, 15 F. Supp. 425 (E. D. N. Y.), aff's. 84 F. (2d) 1002 (C. C. A. 2).

In the present instance, when the fog had lifted somewhat around 10 A. M., the master of the "Bohemian Club" found that his vessel was anchored on the easterly side of the channel near the bend as determined by the intersecting range courses. That was plain from her position with relation to buoy 2-D which had become visible. The master also knew that, while the tanker had been so anchored for more than two hours, three vessels proceeding downstream around the turn opposite buoy 2-D had passed in safety. Yet, merely to avoid the possibility of fouling the buoy, when his vessel would swing round on the turn of the tide, he lifted anchor and maneuvered his boat in weather so unsettled that within five minutes after lifting anchor and when, because of the density of the redescending fog, he no longer knew where he was, he found it necessary again to drop anchor. As a consequence, the tanker was farther out in the channel with her bow on the Bulkhead Bar Range course and her stern tailing off to the west of the course—a position particularly obstructive to vessels proceeding [fol. 12] downstream and required to make the swing to the left in turning from the Deepwater Point Range. The master having deliberately lain his vessel open to the peril which caused him to violate a statutory rule, may not then point to the fog for legal justification of his conduct and particularly not, when he is unable to show that his vessel's position neither prevented nor obstructed the passage of other boats in the channel.

In view of the tanker's particular fault (unjustifiable violation of a statute) little need be said as to its contribution to the collision. In The Pennsylvania, 19 Wall. (86 U.S.) 125, 136, the Supreme Court said that, "* * * when, * * * a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might have been one of the causes, or that it probably was not, *but that it could not have been.*" (Emphasis supplied.) See also Belden v.

Chase, 150 U. S. 674, 699; General Seafoods Corporation v. J. S. Packard D. Co., 120 F. (2d) 117, 120 (C. C. A. 1). That burden, the owner of the tanker failed to meet. Indeed, in the light of the circumstances, it was impossible for the libellant to show that the anchorage of the tanker on the range course could not have been a cause of the collision. As found both below and here, the tanker's anchorage prevented and obstructed the free passage of other vessels on the course.

Where fault on the part of both vessels contributes to a collision, the rule of divided damages is applicable. The Schooner Catharine v. Dickinson, 17 How. (58 U. S.) 170, 177-178. And, where a case for divided damages is presented in one suit, as here, a single decree is entered in favor of the vessel which suffered the greater loss for one-half of the difference between the respective damages to both vessels, or, stated otherwise, for the amount by which [fol. 13] the greater loss exceeds one-half of the total damages to both vessels. See The North Star, 106 U. S. 17, 20; 3 Benedict on Admiralty (6th ed.) §417a, p. 186. The costs, as well, are evenly divided. The America, 92 U. S. 432, 438; 3 Benedict supra §439, p. 233.

The decree of the District Court is reversed and the cause remanded for further proceedings in accordance with this opinion.

BIGGS, *Circuit Judge*, dissenting.

The conclusion of the majority puts far too heavy a burden upon the master of any vessel situated as was the "Bohemian Club" fog-bound upon the Delaware on the morning of December 20, 1939. She was compelled to drop anchor on the short Bulkhead Bar Range in a narrow channel. About two hours later, the fog lifted sufficiently for her master to see a buoy so close at hand that upon the turn of the tide the vessel might be reasonably expected to foul it. The master thereupon took up the tanker's anchor, put her rudder hard to right and put the engines at slow speed ahead for about two minutes. A few minutes later the fog closed down again obscuring even the buoy. The master thereupon put the "Bohemian Club" at anchor again.

As a result of this maneuver the "Bohemian Club" was carried toward the west and farther out into the channel. Here, a short time later she was struck by the "Laura

Maersk". This vessel was proceeding down the River at a rate of speed which was certainly excessive under the prevailing conditions of alternate fog and reasonably clear visibility. A heavy fog bank to the eastward side of the Deepwater Point Range was clearly visible to the "Laura Maersk". When the "Bohemian Club" finally was sighted by the "Laura Maersk" in this very fog bank it was too late for the latter vessel to avoid the collision.

The master of the "Bohemian Club" in moving the tanker to avoid the buoy acted prudently. He took his ves- [fol. 14] sel out of a position of positive danger while he could do so. He had a right to assume that any vessel moving up or down the channel was proceeding with prudence. The "Laura Maersk" was not so proceeding and the collision was caused by her imprudent conduct.

The opinion of the majority seems to me to require the master of the "Bohemian Club" to exercise prescience, or in lieu of prescience, to guess that a negligently operated vessel proceeding down the river would collide with the "Bohemian Club" if that vessel moved to escape the buoy. This seems to me to be an unreasonable rule. I must respectfully dissent.

A true Copy:

Teste:

——— ———, *Clerk of the United States Circuit Court of Appeals for the Third Circuit.*

[fol. 15] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7970

ATLANTIC REFINING COMPANY, Owner of Tank Steamship "Bohemian Club," Libellant-Appellee,

v.

MOTOR VESSEL "LAURA MAERSK", Her Engines, Tackle, Apparel, etc., A. P. Moller, Claimant-Appellant

A. P. MOLLER, Managing Owner of the Motor Vessel "Laura Maersk", Cross-Libellant-Appellant,

v.

TANK STEAMSHIP "BOHEMIAN CLUB", Her Engines, Tackle, Apparel, etc., THE ATLANTIC REFINING CO., Claimant-Appellee

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby reversed, with costs, and the cause is remanded to the said District Court for further proceedings in accordance with the opinion of this court.

October 21, 1942. Jones, Circuit Judge.

Endorsements:

Order Reversing Decree of District Court, etc.
Received and Filed October 21, 1942.
Wm. P. Rowland, Clerk.

[fols. 125-127] IN UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT

PETITION FOR REHEARING

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Third Circuit:

The Atlantic Refining Company, the libellant-appellee in the above entitled cause, respectfully petitions your Honorable Court for a rehearing on the following grounds:

I. In holding that the "BOHEMIAN CLUB" was guilty of a fault which contributed to the collision, in that her master violated a statutory rule without legal justification, the majority of this Court erroneously reached a conclusion which:

(a) Is not supported by any authority and is in direct conflict with the decisions rendered by the Circuit Court of Appeals for the Second Circuit and by the Circuit Court of Appeals for the Fourth Circuit; and

(b) Has brought about an anomalous and hazardous situation which exists in no other Circuit, and which it is in the public interest, and of immediate concern to all navigators, for this Court to consider upon a reargument of the cause.

II. The majority of this Court erroneously failed to consider the conduct of the master of the "BOHEMIAN CLUB" in the light of the established rule of law that a navigator is not to be charged with negligence unless his decision is one which nautical experience and good seamanship would condemn as unjustifiable at the time and under the circumstances shown.

[fol. 128] Wherefore, the petitioner respectfully prays that its petition for a rehearing and reargument be granted.

Respectfully submitted, The Atlantic Refining Company, by Its Attorneys, Lewis, Wolff & Gourlay, 208 South 4th Street, Philadelphia, Pa.

Certificate of Counsel

We hereby certify that the foregoing petition for a rehearing is presented in good faith and not for the purpose of delay.

Lewis, Wolff & Gourlay, by Otto Wolff, Jr., Attorneys for Petitioner-Appellee.

[fol. 17] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7970

ATLANTIC REFINING COMPANY, Owner of Tank Steamship Bohemian Club, Appellee,

v.

A. P. MOLLER, Managing Owner of Motor Vessel Laura Maersk, Appellant

Sur Petition for Rehearing

And now, to wit, December 3, 1942, after due consideration, the petition for rehearing in the above-entitled case is hereby granted.

John Biggs, Jr., Circuit Judge.

Philadelphia,
Endorsements:

Order Granting Petition for Rehearing Received and Filed December 3, 1942.
Wm. P. Rowland, Clerk.

[fol. 18] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7970

ATLANTIC REFINING COMPANY, Owner of Tank Steamship "Bohemian Club," Libellant-Appellee,

v.

MOTOR VESSEL "LAURA MAERSK", Her Engines, Tackle, Apparel, etc., A. P. Moller, Claimant-Appellant

A. P. MOLLER, Managing Owner of the Motor Vessel "Laura Maersk", Cross-Libellant-Appellant,

v.

TANK STEAMSHIP "BOHEMIAN CLUB", Her Engines, Tackle, Apparel, etc., THE ATLANTIC REFINING CO., Claimant-Appellant.

And afterwards, to wit, third day of February, 1943, come the parties aforesaid by their counsel aforesaid, and

this case being called for re-argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Charles Alvin Jones and Honorable Herbert F. Goodrich, Circuit Judges; and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 17th day of March, 1943, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 19] In the United States Circuit Court of Appeals for the Third Circuit.—October Term 1941

No. 7970

The Atlantic Refining Company, Owner of the Tank Steamship "Bohemian Club", *Libellant-Appellee*,

v.

Motor Vessel "Laura Maersk", Her Engines, Tackle, Apparel, etc., A. P. Moller, *Claimant-Appellant*

A. P. Moller, Managing Owner of the Motor Vessel "Laura Maersk", *Cross-Libellant-Appellant*,

v.

Tank Steamship "Bohemian Club", Her Engines, Tackle, Apparel, etc., The Atlantic Refining Company, *Claimant-Appellee*

Opinion Sur Rehearing—Filed March 17, 1943

Before Biggs, Jones and Goodrich, *Circuit Judges*

[fol. 20] Jones, *Circuit Judge:*

A majority of the court are of the opinion that the result reached by us in this case upon the first hearing in no way conflicts with either decisions or dicta in the City of Norfolk, 266 Fed. 641 (C.C.A. 4), or The Socony No. 9, 74 F. 2d 233 (C.C.A. 2). It may be conceded that when the "Bohemian Club" first anchored at 7:41 A.M. on the eastern side of the channel, being then unable to proceed because of the density of the fog, her action in such circumstances did not incur liability-creating possibilities. But it is quite

another thing to say that, because the anchorage first taken, out of necessity, would not have furnished a basis of liability, the ship may thereafter lift anchor and maneuver about in the channel, while still obscured by fog, in the hope of finding a supposed better anchorage and then, because of the fog, anchor in the channel without knowledge of her position and in a manner so as to prevent or obstruct the passage of other vessels or craft, and still not be subject to a charge of negligence. To so hold would be to impose a hazard upon navigation which no decided case has yet done and which we do not think would comport with the intendment of the law. See Act of March 3, 1899, c. 425 § 15, 30 Stat. 1152, 33 U.S.C.A. § 409.

The trial judge found, and we have already adopted the finding, that the "Bohemian Club's" second anchorage was made "in such a manner as to present an obstruction to the free passage of other vessels, particularly ones approaching from the other range." But the trial judge did not find, nor do we, that the "Bohemian Club's" first anchorage similarly offended. Indeed, such a broad finding would be unwarranted on the record in this case which shows that three other vessels navigating downstream had passed the "Bohemian Club" in safety while she lay at her first anchorage,—a fact known at the time to the master of the "Bohemian Club," as he testified at trial.

It is true that the later discovered presence of a buoy near at hand to the anchorage first made by the "Bohemian [fol. 21] Club"; plus a belief that the turn of the tide in about two hours would possibly bring the ship in contact with the buoy, presented a problem to the master of the vessel. It is also true that the master, and not a reviewing judge, was then and there in command and had the responsibility of making a decision as to the proper course of action in the circumstances, for which decision liability is not to be imposed for mere error in judgment. But it is equally our duty to pass upon that conduct afterwards, when the matter has become the subject of litigation, and to decide whether, in our judgment, what was done was done in the exercise of due care.[1] We think our conclusion that both the "Laura

[1] Captain Down of the "White Flash", a sister ship of the "Bohemian Club" and one of the ships which had passed downstream in safety while the "Bohemian Club" was at her first anchorage, testified at trial, as a witness for

Maersk" and the "Bohemian Club" were at fault is correct. The order entered herein on October 21, 1942, is therefore confirmed.

[fol. 22] BIGGS, *Circuit Judge* (Dissenting):

The rule of navigation which the majority opinion announces nails a vessel in a fixed position of known danger in a narrow channel and provides that if she moves she does so at peril of being held to be negligent.

The Bohemian Club was a large, long vessel.[1] When she anchored in the dense fog,[2] unknown to her master she was close to a large steel buoy and very close to the east edge

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the libellant,—"Yes, I figured on anchoring if the weather stayed in that condition, as soon as I could, *off the ranges.* * * *" (Emphasis supplied.) But, the "Bohemian Club's" bow was right on the range line after she had made her second anchorage. Down also gave as "one reason why" he had not anchored sooner than he did,— "* * * I thought I would get down as far as I could. With that draft I could anchor on the westward or eastward side *and be out of the channel of anything that was moving.*" (Emphasis supplied.) Yet that was precisely what the master of the "Bohemian Club" did not do when he changed his place of anchorage.

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[1] The Bohemian Club was 435 feet over all in length. She drew 27 feet 1 inch aft and 27 feet forward. She was fully loaded with crude oil.

[2] The master of the Bohemian Club stated: "There was no visibility when I anchored. Therefore, it wasn't safe to navigate any further." He testified also that just as he turned on the Bulkhead Range another ship, the Gulfpride, was ahead of him; that he lost sight of this vessel in the fog and that the Gulfpride blew "three whistles" which indicated that its engines were being put full speed astern. Obviously the master of the Bohemian Club could no nothing else but anchor. The channel of the Bulkhead Bar Range is 35 feet deep. That portion of the channel lying to the east of the range line was 400 feet in width and that part of the channel lying to the west of the range line was 800 feet. These facts are not in dispute. The majority opinion quotes Captain Down of the motor vessel White Flash (one of the vessels which passed the Bohemian Club going

of the channel. She was therefore in a position of some danger even before the turning of the tide. If she had remained in the same position, with the turning of the tide, probably she would have fouled the buoy or have gone aground. At the time her master moved her, she was jutting out into the east half of the channel and her stern was near to or over the range line.

When the fog thinned or lifted, about two hours before the turning of the tide, her master, for the first time able to see the vessel's dangerous position, took the opportunity to drop the Bohemian Club a little way downstream and away from the dangers which confronted her. This was sound seamanship, as the learned District Judge found. [fol. 23] The fog thickened immediately and the master was forced to anchor the vessel again. At this anchorage the Bohemian Club was in the west part of the channel. Her direction (that is to say, her angle in respect to the channel) was almost the same at it was before. There is but one reason why the majority conclude that the Bohemian Club was not in a position of danger in the east part of the channel and was in a position of danger in the west part of the channel. The reason is that three vessels bound *downstream* passed the Bohemian Club while she was on the east side of the channel. They passed her, as would be expected, without mishap. If a vessel had attempted to move upstream on the east side of the range line (as negligently as did the Laura Maersk moving downstream) while the Bohemian Club was anchored in her first position inevitably a collision would have occurred.

The majority rule requires the master of the Bohemian Club to have possessed prescience, to *have had knowledge*

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downstream when the Bohemian Club was anchored to the east of the range line) to the effect that the Bohemian Club could have anchored out of the channel on the Bulkhead Bar Range. An examination of the chart of the Delaware River in evidence shows the practical impossibility of such a course. Though there was some water both to the east and the west of the Bulkhead Bar Range which was deep enough to permit a vessel of the draft of the Bohemian Club to anchor, it is difficult to believe that a master could have picked it out in a fog. In addition, this deep water is so small in area and so close to shoal water or shore as to make such an operation difficult even in the best of weather.

that the Laura Maersk would be operated negligently and to have known also that if he moved the Bohemian Club from her first anchorage he would move her into a position of danger from a negligently operated vessel moving downstream. This rule misinterprets the Act of March 3, 1899, c. 425, Section 15, 30 Stat. 1152, 33 U.S.C.A. § 409. It is a very novel rule. It substitutes the court's knowledge *post* the event for a master's judgment exercised reasonably in an emergency. The rule renders navigation more difficult, for a vessel once anchored because of fog must remain at its first anchorage even if it be in a dangerous position, until the fog has lifted, not momentarily, but completely. I think it is unfortunate that this jurisdiction, which includes within its territorial limits one of the great rivers of the country, should embrace such a rule.

Accordingly I reiterate my previous dissent.

A true Copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 24] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 7970

ATLANTIC REFINING COMPANY, Owner of Tank Steamship "Bohemian Club", Libellant-Appellant,

vs.

Motor Vessel "LAURA MAERSK", Her Engines, Tackle, Apparel, etc., A. P. MOLLER, Claimant-Appellant

A. P. MOLLER, Managing Owner of the Motor Vessel "Laura Maersk", Cross-Libellant-Appellant,

vs.

Tank Steamship "BOHEMIAN CLUB", Her Engines, Tackle, Apparel, etc., THE ATLANTIC REFINING Co., Claimant-Appellee

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

This cause came on to be reheard on the transcript of record from the District Court of the United States, for

the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the order entered by this Court in this cause on October 21, 1942 be, and the same is hereby confirmed.

March 17, 1943.

Jones, Circuit Judge.

[fol. 25] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendices to the Briefs of Counsel, as constituting the portions of the record before this court at argument; and proceedings in this court in the case of Atlantic Refining Company, Owner of Tank Steamship "Bohemian Club", Libellant, vs. Motor Vessel "Laura Maersk", her Engines, Tackle, Apparel, etc., A. P. Moller, Claimant, No. 7970, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 1st day of April in the year of our Lord one thousand nine hundred and forty-three, and of the Independence of the United States the one hundred and sixty-seventh.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 136] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 1, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 47,476, U. S. Circuit Court of Appeals, Third Circuit, Term No. 975. The Atlantic Refining Company, Owner of the Tank Steamship "Bohemian Club", Petitioner, vs. A. P. Moller, Claimant of the Motor-Vessel "Laura Maersk". Petition for a writ of certiorari and exhibit thereto. Filed April 29, 1943. Term No. 975 O. T. 1942.

(6574)

FILE COPY

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FILED
APR 29 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1942.

No. 875 56

THE ATLANTIC REFINING COMPANY, Owner of the Tank Steamship "BOHEMIAN CLUB",

Petitioner,

v.

A. P. MOLLER, Claimant of the Motor Vessel "LAURA MAERSK".

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

OTTO WOLFF, JR.,
1500 Lincoln-Liberty Building,
Philadelphia, Pa.,
Proctor for Petitioner.

International, 236 Chestnut St., Philadelphia

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IN THE

Supreme Court of the United States.

No. . October Term, 1942.

THE ATLANTIC REFINING COMPANY, OWNER OF THE TANK STEAMSHIP "BOHEMIAN CLUB",

Petitioner,

v.

A. P. MOLLER, CLAIMANT OF THE MOTOR VESSEL "LAURA MAERSK".

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Atlantic Refining Company respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled cause on March 17, 1943 (R. p. 134).

JURISDICTION.

The judgment of the Circuit Court of Appeals was first entered on October 21, 1942; a petition for rehearing was granted on December 3, 1942; the judgment of the Court confirming its judgment of October 21, 1942, was entered on March 17, 1943. This petition was filed April 29, 1943.

The cause is one of collision, civil and maritime, in which the jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; 28 U. S. C. 347.

SUMMARY STATEMENT OF THE ISSUES INVOLVED.

On December 20, 1939, the Tanker "BOHEMIAN CLUB", owned and operated by your petitioner, while proceeding up the channel of the Delaware River encountered a dense fog which blotted out all indicia of position. Being then unable to proceed, she was anchored at 7.41 A. M. Shortly after 10 A. M. the fog lifted sufficiently to enable those in charge of her navigation to observe, for the first time, that the Flash Buoy, known as 2-D, on the easterly side of the channel limits, at the intersection of the Bulkhead Bar and the Deepwater Point Ranges, was off the vessel's starboard bow, at an angle of about 45 degrees and about 150 feet distant. The tide was then ebb, but was due to change to flood in about 2 hours. Realizing that if compelled to remain at anchor where he was, his vessel would be in danger of fouling the buoy in swinging with the tide when it changed from ebb to flood, the master of the "BOHEMIAN CLUB" lifted his anchor and inaugurated manoeuvres with the intention of drifting down stream with the tide, and away from the Buoy, to a position of greater safety. At 10.18 A. M., however, and before completing his manoeuvres, a sudden redescent of the fog which again blotted out the Buoy 2-D and left him without any indicia of position, compelled him to anchor where he was. The fog continued, and the "BOHEMIAN CLUB" remained at anchor, until about 11.37 A. M., when she was in collision with the Danish Motor Vessel "LAURA MAERSK."

The "LAURA MAERSK" had been proceeding down the Delaware River at varying speeds of from 13 to 18 knots an hour, and those in charge of her navigation were not aware of the presence of the "BOHEMIAN CLUB" until they saw her loom up out of the fog about 5 degrees off their

port bow, and about 500 feet distant. Before the "LAURA MAERSK" could be brought to a stop she collided with the anchored "BOHEMIAN CLUB", almost head on. Both vessels sustained serious damage.

When the "BOHEMIAN CLUB" lifted her anchor, preparatory to shifting away from the Buoy 2-D, she was anchored in the channel of the Bulkhead Bar Range section of the river, on the easterly side of the range line, and had steadied on a heading of approximately 30 degrees. At the time of the collision, as those in charge of her navigation subsequently learned, her bow was on the range line, with her stern tailing to the westward, and her heading between 26 to 30 degrees. The course up the Bulkhead Bar Range is 9 degrees; the angle between the Bulkhead Bar Range and the Deepwater Point Range is 34 degrees; the channel of the Delaware River, on the Bulkhead Bar Range, is 1200 feet wide—400 feet wide to the eastward of the range line, and 800 feet wide to the westward thereof.

The facts as stated above are the facts as found by the learned trial Judge of the District Court (Opinion, Findings of Fact and Conclusions of Law; R. p. 103) and were accepted by the Circuit Court of Appeals as the facts in the case (Opinion, R. p. 115).

The Atlantic Refining Company, as owner of the "BOHEMIAN CLUB", filed a libel against the "LAURA MAERSK", *in rem*, in the United States District Court for the Eastern District of Pennsylvania, claiming damages in the sum of approximately $40,000.00. A. P. Moller, Managing Owner of the "LAURA MAERSK", filed a Cross-Libel against the "BOHEMIAN CLUB", *in rem*, and against the Atlantic Refining Company, *in personam*, claiming damages in the sum of approximately $15,000.00.

THE OPINIONS OF THE COURTS BELOW.

(a) The District Court.

The District Court held (R. p. 103) that the collision was due solely to the fault of the "LAURA MAERSK", and entered an Interlocutory Decree (R. p. 113) wherein it awarded The Atlantic Refining Company, your petitioner, the full amount of its damages, with interest and costs, and dismissed the cross-libel of the claimant of the "LAURA MAERSK", with costs.

(b) The Circuit Court of Appeals.

The three judges of the Circuit Court of Appeals affirmed the finding of the District Court that the "LAURA MAERSK" was at fault; but the majority of the Court were of the further opinion that the "BOHEMIAN CLUB" was guilty of a contributing statutory fault in that she had violated the provisions of the Act of March 3, 1899, c. 425, Sec. 15, 30 Stat. 1152; 33 U. S. C. Sec. 409, which provides that it shall be unlawful for a vessel to anchor in the navigable channel of a river in such a manner as to prevent or obstruct the passage of other vessels (R. p. 115). The dissenting Judge filed a dissenting opinion (R. p. 122). The Court, accordingly, entered a judgment on October 21, 1942 (R. p. 124), whereby it reversed the decree of the District Court, with costs, and remanded the cause to the District Court for further proceedings in accordance with the opinion of the Circuit Court of Appeals.

A rehearing was granted by the Circuit Court of Appeals on the petition of your petitioner; and in the opinion filed by them sur rehearing (R. p. 130) the majority of the Court reaffirmed their previous conclusion that the "BOHE-

MIAN CLUB" was guilty of a statutory fault, and the dissenting Judge reiterated his previous dissent (R. p. 132). On March 17, 1943, the Court entered a judgment (R. p. 134) whereby it confirmed its prior judgment of October 21, 1942.

THE QUESTION PRESENTED.

Is a navigator, who is compelled to anchor his vessel, because of fog, in the navigable channel of a river, and who, upon ascertaining during a temporary lift in the fog that his position is one of danger, inaugurates a manoeuvre to place his vessel in a position of greater safety, but who, before completing his manoeuvre, is again compelled to anchor because of a sudden redescent of the fog which blots out all indicia of position, and who thereupon anchors his vessel in a position where, unknown to himself at the time, she obstructs the passage of other vessels on that side of the channel in which she is anchored, guilty of a violation of the Act of Congress approved March 3, 1899?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The majority of the Circuit Court of Appeals have rendered a decision under a Federal statute which has never been, but which should be, interpreted by this Court in the public interest, and as a matter of paramount importance to all navigators.

2. The majority of the Circuit Court of Appeals have rendered a decision involving the interpretation and application of a Federal statute in a way which is probably in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *The City of Norfolk*, 266 Fed. 641,

and with the decision of the Circuit Court of Appeals for the Second Circuit in *The Socony No. 9*, 74 Fed. (2d) 233.

3. In holding the master of the "Bohemian Club" guilty of a statutory fault, the majority of the Circuit Court of Appeals announced a rule of navigation which is unsupported by authority, and which, in the opinion of the dissenting Judge of that Court is (1) a "very novel rule", (2) a rule which "misinterprets the Act of March 3, 1899", and (3) a rule which "renders navigation more difficult".

4. In holding the master of the "Bohemian Club" guilty of a statutory fault, the majority of the Circuit Court of Appeals have interpreted the Act of Congress approved March 3, 1899, in a manner which is not only unsupported by authority, and renders navigation more difficult, but which is contrary to the intendment of the Act, is opposed by every consideration of reason, and will be conducive to marine disasters in that it must necessarily lead to hesitation, doubt and indecision on the part of a navigator when confronted with a similar situation of danger.

PRAYER FOR WRIT OF CERTIORARI.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of your Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit requiring that Court to certify and send to this Court for review and determination on a day certain to be named therein a full and complete transcript of the Record and proceedings in the case numbered on its docket No. 7970, and entitled The Atlantic Refining Company, owner of the Tank Steamship "Bohemian Club", libellant-appellee, v. Motor Vessel

"LAURA MAERSK", her engines, tackle, apparel, etc., A. P. Moller, claimant-appellant; and A. P. Moller, Managing Owner of the Motor Vessel "LAURA MAERSK", cross-libellant-appellant, v. Tank Steamship "BOHEMIAN CLUB", her engines, tackle, apparel, etc., The Atlantic Refining Company, claimant-appellee; and that the decree of the United States Circuit Court of Appeals for the Third Circuit in this case may be reversed by your Honorable Court, and that your petitioner may have such other and further relief in the premises as may be just. And your petitioner will ever pray, etc.

THE ATLANTIC REFINING COMPANY,

By OTTO WOLFF, JR.,
Proctor for Petitioner.

CERTIFICATION.

I hereby certify that I am a member of the Bar of the Supreme Court of the United States; that I am Proctor for The Atlantic Refining Company, the petitioner herein; that the foregoing petition has been prepared in accordance with the request of the petitioner; that the allegations in said petition are true to the best of my knowledge, information and belief; that said petition is not made for the purpose of delay or prolongation of litigation; and that in my opinion said petition is well founded in law and in fact, and should be granted.

OTTO WOLFF, JR.

IN THE SUPREME COURT OF THE UNITED STATES.

No. . OCTOBER TERM, 1942.

THE ATLANTIC REFINING COMPANY, OWNER OF THE TANK STEAMSHIP "BOHEMIAN CLUB",
Petitioner,

v.

A. P. MOLLER, CLAIMANT OF THE MOTOR VESSEL "LAURA MAERSK".

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion, findings of fact and conclusions of law of the United States District Court for the Eastern District of Pennsylvania (R. p. 103) filed under date of September 10, 1941, are reported in 40 Fed. Supp. 641.

The opinion of the United States Circuit Court of Appeals for the Third Circuit (R. p. 115) was filed on October 21, 1942; the opinion of the Court sur rehearing (R. p. 130), was filed March 17, 1943. Neither of these opinions has as yet been reported.

II.

JURISDICTION.

1. The date of the judgment entered herein by the United States Circuit Court of Appeals for the Third Circuit is March 17, 1943.

2. This is a proceeding within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

3. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, United States Code, Title 28, Section 347.

III.

STATEMENT OF THE CASE.

A statement of the case appears in the petition (*ante* p. 2) and a restatement of the same is here omitted in the interest of brevity.

IV.

SPECIFICATIONS OF ERROR.

1. The Circuit Court of Appeals for the Third Circuit erred in reversing the decree of the District Court of the United States for the Eastern District of Pennsylvania.

2. The Circuit Court of Appeals for the Third Circuit erred in holding that the master of the "BOHEMIAN CLUB" was guilty of a statutory fault.

3. The Circuit Court of Appeals for the Third Circuit erred in holding that the position in which the "BOHEMIAN CLUB" was anchored at the time of the collision was a violation of a statutory rule which cannot be justified by a necessity for anchoring resulting from her change of position in foggy weather.

V.

ARGUMENT.

Point I.

The Conclusion of the Majority of the Court Below That the Master of the "Bohemian Club" Was Guilty of a Statutory Fault Is Contrary to the Intendment of the Act of March 3, 1899, Is Unsupported by Authority, Is In Conflict With the Liberal Interpretation Placed Upon the Act by the Federal Courts, Without Exception, and Is Opposed by Every Consideration of Reason.

The Act of March 3, 1899, c. 425, Sec. 15, 30 Stat. 1152; 33 U. S. C. 409, is set out in full in the Appendix hereto attached. The provision of the Act relevant to this proceeding reads as follows:

> "It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft * * *"

The question presented is whether the provisions of the Act of March 3, 1899, are so rigorous and inexorable that a navigator who is compelled to anchor in the channel of a river, because of fog, must remain where he is, notwithstanding that he subsequently finds his position to be one of danger, and can venture to move his vessel to a position of safety only at the peril of being found guilty of a statutory fault, if, through circumstances beyond his control, he is again compelled to anchor, before completing his manoeuvers, at a point where his vessel is, allegedly, more of an obstruction to other vessels than she had previously been. It is our contention that such an interpretation of the Act is contrary to the legislative intent; is un-

supported by authority; is in conflict with the liberal interpretation placed upon the Act by the Federal courts, without exception; and is opposed by every consideration of reason. Yet it was precisely upon such an interpretation of the Act that the majority of the Court below based their conclusion that the master of the "BOHEMIAN CLUB" had been guilty of a statutory fault. It is because of the far reaching consequences of that decision, as hereinbelow set forth, that we respectfully submit this case should be reviewed by your Honorable Court on certiorari.

In *The Caldy*, 123 Fed. 802 (D. of Md.), affirmed 153 Fed. 837 (C. C. A. 4), the District Court, referring to the Act of March 3, 1899, said:

> "Unquestionably, the Act of Congress being in aid of commerce and navigation should receive a sensible construction to further that end, * * *. So far as concerns the liability in case of collision, the statute probably only emphasizes the previously existing maritime law. It has always been held a fault to so anchor a vessel as to unnecessarily and negligently obstruct a navigable channel. Spencer on Collisions, Sec. 152."

The words "prevent or obstruct" as used in the Act, have been held to connote limited restraint, rather than an absolute or complete prohibition: *The Europe*, 190 Fed. 475 (C. C. A. 9); *The Caldy, supra* (C. C. A. 4); and in interpreting the Act the Federal courts, without exception, have adopted a liberal rule of construction, and have held that if a vessel can justify herself for anchoring in the channel of a navigable river, notwithstanding that she may be anchored in such a manner as to prevent or obstruct the passage of other vessels, she is without fault for doing so:

The City of Norfolk, 266 Fed. 641 (C. C. A. 4) Cert. den. 253 U. S. 491;
The Socony No. 9, 74 Fed. (2d) 233 (C. C. A. 2);
The City of Birmingham, 138 Fed. 555 (C. C. A. 2); Cert. den. 199 U. S. 607;
The Lehigh, 15 Fed. Supp. 425; aff. 84 Fed. (2d) 1002 (C. C. A. 2);
The Southern Cross, 93 Fed. (2d) 297 (C. C. A. 2);
The Limon, 35 Fed. (2d) 730 (C. C. A. 1);
The Vera, 226 Fed. 369 (C. C. A. 1);
The Welcombe, 19 Fed. Supp. 874 (E. D. N. Y.);
The Itasca, 117 Fed. 885 (S. D. Ga. E. D.).

In *The City of Norfolk, supra*, the Circuit Court of Appeals for the Fourth Circuit, in construing the Act said (italics supplied):

> "If the fog is so dense as to justify the master in believing that another vessel going *at a moderate speed* could not be seen at the distance in which he could stop his vessel, and that the two vessels would be in danger of collision, then the master should anchor and give the statutory signals. *Even if he thus obstructs the channel, he is not responsible, because it is done under necessity.* Doubt as to this necessity should be solved by weighing all the circumstances and conditions • • •. If the navigator of the vessel, upon careful consideration of all the circumstances reasonably concludes that necessity requires anchorage *he should not be held in fault*, and in case of collision should be held *entitled to the presumption in favor of the vessel at rest against a moving vessel.*"

Similarly, in *"The Socony No. 9"*, *supra*, the Circuit Court of Appeals for the Second Circuit held (italics supplied):

"It is quite true that the general duty of a vessel not to anchor in a fairway (Section 409, title 33, U. S. Code), exists in a fog as well as at any other time. La Bourgogne, 86 Fed. 475 (2 C. C. A.); The Persian, 181 Fed. 439 (2 C. C. A.). But like most duties, *it is not absolute;* she may have an interest *which will excuse her;* for example, *the fog may be so dense,* the quarters so close, and a safe berth so difficult and dangerous to reach, that the balance of advantage to all concerned *makes it best to anchor where she is.* In the case at bar it was theoretically possible for the tugs to try for some Staten Island slip nearby. When questioned, the master of the Joyce Card, who was in charge, would only answer that 'with that draft of water we can't go into every pier', and that it seemed safer for his own vessel to stay where he was. *That was not a very convincing excuse,* and yet we are disposed *to accept his judgment made at the time,* under the doctrine of A. P. Skidmore, 115 Fed. 791 (C. C. A. 2); City of Norfolk, 266 Fed. Rep. 641, 645, (C. C. A. 4) and the Northern Queen, 117 Fed. 906. * * *"

"The choice was doubtful whatever it was, and there is no such clear weight against the master's judgment, *made on the spot,* as to charge his vessels."

Referring to the foregoing decision in the *City of Norfolk,* the majority of the Court below said (italics supplied):

". . . the Court did say that if a fog becomes so dense that a vessel cannot move safely then she should anchor and give the statutory signals and that, '*Even if he (the master) thus obstructs the channel, he is not responsible, because it is done under necessity.*' Actually *the latter observation was a dictum.*"

and in referring to the decision in the *Socony No. 9, supra,* the majority of the Court below held that it was distinguishable on its facts, and said:

"While the tanker as anchored in the Socony case did obstruct ferries coming into the rack, it did not constitute an obstruction to the tug which actually collided with her in the fog."

Having thus reached the conclusion that the decisions of the Circuit Court of Appeals for the Fourth Circuit in the *City of Norfolk, supra,* and for the Second Circuit in the *Socony No. 9, supra,* were not applicable, the majority of the Court below then held that since the "BOHEMIAN CLUB" by "her own deliberate choice of a change of position in foggy weather," had laid herself open to the peril which caused her to violate a statutory rule, she could not justify herself for anchoring where she did by the necessity for doing so which arose when, because of the density of the redescending fog, her master no longer knew where he was. The "BOHEMIAN CLUB'S" "*particular fault*", said the majority of the Court below, was an "*unjustifiable violation of a statute*" (R. p. 121) and to support that conclusion the majority cited the decision of the Circuit Court of Appeals for the Second Circuit in *The City of Birmingham,* 138 Fed. 555, cert. den. 199 U. S. 607, and the decision of the District Court for the Eastern District of New York in *The Lehigh,* 15 Fed. Supp. 425, affirmed 84 Fed. (2d) 1002 (C. C. A. 2). In both of these cases, however, it should be particularly noted that the vessel charged with a violation of the Act *was under no necessity for anchoring where she did.* Thus:

In *The City of Birmingham, supra,* the Court held (italics supplied):

"The Courts should not encourage laxity and shiftlessness by rewarding a master who places his craft in a position of danger *simply because it is too much trouble* to place her in a position of safety";

and in denying a petition for a rehearing the Court said (italics supplied):

> "Irrespective of the statute, the dredge was at fault in anchoring where she did at night, when there was *nothing to prevent her* from removing to a position where it would have been impossible for steamers to have reached her."

Similarly, in *The Lehigh, supra,* the District Court for the Eastern District of New York, held (italics supplied):

> "The fact that the fog came up suddenly did not justify the 'BARWICK' in anchoring immediately, but it was her duty to seek proper anchorage. *Such an anchorage was available.*"

The provisions of the Act of March 3, 1899, are, manifestly, in aid of commerce and navigation; and therefore, we respectfully submit, the Act should be interpreted and applied with due regard to the fundamental rule of navigation which requires a navigator, when confronted with a situation which he believes to be one of danger, to inaugurate such measures of safety as he, in the exercise of his judgment as an experienced navigator, may deem to be necessary and appropriate; and that when he has done so, he is not chargeable with negligence unless his decision is one which nautical experience and good seamanship would condemn as unjustifiable at the time and under the circumstances shown:

The Clarence L. Blakeslee, 243 Fed. 365 (C. C. A. 2);
The A. P. Skidmore, 115 Fed. 791 (C. C. A. 2);
The Battler, 72 Fed. 537 (C. C. A. 3); cert. den. 163 U. S. 697;
The Garden City, 127 Fed. 298 (C. C. A. 6).

In the instant case, the master of the "BOHEMIAN CLUB", when he found that he was anchored in a position where he would incur the danger of fouling the Buoy 2-D, if unable to proceed before the change in the tide, was confronted with a situation in which his only alternatives were to remain where he was and thereby incur the risk of fouling the buoy, or to move his vessel away to a position of greater safety while the opportunity presented itself. It was a situation in which, under the prevailing conditions, there was little time for deliberation; and when he concluded to move his vessel away he exercised the judgment of an experienced master who had been licensed for all oceans, and for vessels of any tonnage, and who also held a first class pilot's license for the Delaware Bay and River. The District Court held that his decision was a "reasonable" one (R. p. 109), and the learned dissenting Judge of the Court below said (R. p. 123) that in moving his vessel to avoid the buoy he had "acted prudently. He took his vessel out of a position of positive danger while he could do so." There was no evidence to support any finding to the contrary; and in reaching the conclusion that he was, nevertheless, guilty of a *statutory fault*, the majority of the Court below construed and applied the provisions of the Act of March 3, 1899, in a manner which, we respectfully submit, is not in accord with the legislative intent, and is opposed by every consideration which has induced the Federal courts, without exception, to give the Act a liberal construction as an aid to commerce and navigation. The learned dissenting Judge was moved to say in his dissenting opinion sur rehearing (R. p. 134) that the majority had announced a rule of navigation which is a "very novel rule"; a rule which "misinterprets the Act of March 3, 1899;" which

"substitutes the court's knowledge post the event for a master's judgment exercised reasonably in an emergency"; which "renders navigation more difficult, for a vessel once anchored because of fog must remain at its first anchorage even if it be a dangerous position, until the fog has lifted, not momentarily, but completely". He further said: "I think it is unfortunate that this jurisdiction, which includes within its territorial limits one of the great rivers of the country, should embrace such a rule."

We respectfully submit, moreover, that the decision rendered by the majority of the Court below not only brings into question the correctness of the interpretation of the Act announced by the Circuit Court of Appeals for the Fourth Circuit in the CITY OF NORFOLK, *supra*, which the majority of the Court below held was *a dictum;* but also, because of the very forceful opinion filed by the dissenting Judge, creates a substantial doubt as to the rule of navigation prevailing in the Third Circuit itself. The Circuit Court of Appeals for the Third Circuit presently comprises four judges; and since only two of them have concurred in the majority opinion filed in the instant case, a doubt necessarily arises as to whether the rule of navigation announced by them will be accepted by the Court as the law of the forum should the question again arise when the Court comprises a different personnel.

Any doubt or uncertainty as to the requirements of the Act, in any given situation, we respectfully submit, must necessarily lead to hesitation, doubt and indecision on the part of a navigator when suddenly confronted with a similar situation in time of fog; and nothing is more conducive to a marine disaster than indecision on the part of a navigator at a moment of danger. It is imperative, we respectfully submit, in the interest of safety, that the rules of

navigation be clear and precise, and that they be interpreted by the Courts in such an unmistakable manner that there can be no doubt, in any given situation, as to what the law requires.

In *Belden v. Chase*, 150 U. S. 674, 699, this Court said (italics supplied):

> "Masters are bound to obey the rules *and entitled to rely on the assumption that they will be obeyed*, and should not be encouraged to treat the exceptions as subjects of solicitude rather than the rules."

The master of the "BOHEMIAN CLUB", accordingly, was entitled to assume that any vessel under way would comply with the law, and would, in accordance with the rule of law declared by this Court in *The Chattahoochee*, 173 U. S. 540, 548, proceed at such a rate of speed as to be able, upon sighting another vessel, to stop in time to avoid a collision. When, therefore, he concluded to move his vessel away from the buoy to a position of greater safety, he was under no obligation to be solicitous over the possibility that if, because of the unsettled weather conditions, he might again be obliged to anchor before completing his manoeuver, another vessel, approaching in an unlawful manner, i. e. at an excessive rate of speed, as did the "LAURA MAERSK", might come into collision with him. The doubt to which the decision rendered by the majority of the Court below has now given rise, however, is whether a master, confronted with a situation of danger, ought to treat the possibility that a vessel proceeding in an unlawful manner may come into collision with him as "a subject of solicitude" rather than the safety of his own vessel. The interpretation placed by the learned dissenting Judge upon the rule of navigation announced by the majority of

the Court below is that "a vessel in a fixed position of known danger in a narrow channel", can move away only "at peril of being held to be negligent." Such a rule of navigation is so opposed to the basic consideration which underlies every rule of navigation as to call, we respectfully submit, for a review by your Honorable Court. The rules of navigation are designed to promote safety in the furtherance of commerce and navigation; and any rule of navigation which discourages a master from instituting such measures of safety as he may regard as essential for the safety of his own vessel, when he can do so without endangering any other vessel, assuming always that such other vessel is herself being navigated with a proper regard for the law, cannot, we respectfully submit, be reconciled with what has heretofore been regarded as a master's obligation when confronted with a situation of danger. The Court below was unanimous in finding that the "LAURA MAERSK" was at fault for her excessive speed, and the majority of the Court did not except to the finding of the learned trial Judge (Conclusion of law No. 3; R. p. 112) that: "The measures required of a vessel at anchor in fog were taken by those in charge of the 'BOHEMIAN CLUB' after it anchored at 10:18 A. M." They held that the "particular fault" of the "BOHEMIAN CLUB" was "a statutory fault", in that where she anchored after 10:18 A. M., she obstructed the passage of other vessels.

The facts in the instant case therefore present a situation which brings into immediate question the intendment of the Act of March 3, 1899, which has never been, but which should be, we respectfully submit, for the several reasons herein discussed, be construed by your Honorable Court on a review of this case.

Point II.

The Conclusion of the Majority of the Court Below That the Master of The "Bohemian Club" Was Guilty of a Statutory Fault Was Induced by a Misapprehension of the Uncontroverted Facts in the Case.

As stated in our petition, under the statement of the issues involved, the channel on the Bulkhead Bar Range of the Delaware River where the "BOHEMIAN CLUB" was anchored is 1200 feet wide—400 feet wide to the eastward of the range line and 800 feet wide to the westward thereof (Findings of Fact Nos. 11 and 12; R. p. 104). The course up the Bulkhead Bar Range is 9 degrees true (R. p. 17a). When her anchor was lifted, at about 10 A. M., preparatory to shifting her position, the "BOHEMIAN CLUB" had steadied on a heading of 30 degrees (Finding of Fact No. 10, R. p. 104); and she was, therefore, at an angle of 21 degrees (R. p. 17a) with the range line. At the time of the collision her heading was between 26 and 30 degrees (Finding of Fact No. 21; R. p. 105); and she was therefore at approximately the same angle with the range line as she had been before she was moved. The only difference in her position was that, at the time of the collision, her bow was on the range line with her stern tailing to the westward; whereas before she was moved she was canted across the channel on the easterly side of the range line, with her stern "near to or over the range line", as the learned dissenting Judge said (R. p. 133).

Notwithstanding these uncontroverted facts, the majority of the Court below were of the opinion that the "BOHEMIAN CLUB" in the position where she was first anchored at 7.41 A. M. did not obstruct the passage of other vessels, and based that conclusion upon the fact that, before

she was shifted, three other vessels *proceeding downstream*, had passed her in safety. In reaching that conclusion the majority of the Court overlooked, apparently, that it was the duty of these three vessels to keep to their starboard hand side of the channel, i. e. to the westward of the range line, in accordance with Article 25 of the Inland Rules of Navigation, Act of June 7, 1897, c. 4, sec. 1, 30 Stat. 101; 33 U. S. Code Sec. 210, which reads:

> "In narrow channels, every steam vessel shall, when it is safe and practical, keep to that side of the fairway or midchannel which lies on the starboard side of such vessel."

Obviously, had these three vessel been proceeding *upstream*, the "BOHEMIAN CLUB," while canted across the easterly side of the channel, would have prevented or obstructed their passage. The learned dissenting Judge in his opinion sur rehearing said (R. p. 133):

> "There is but one reason why the majority conclude that the 'BOHEMIAN CLUB' was not in a position of danger in the east part of the channel and was in a position of danger in the west part of the channel. The reason is that three vessels bound *downstream* passed the 'BOHEMIAN CLUB' while she was on the east side of the channel. They passed her, as would be expected, without mishap. If a vessel had attempted to move upstream on the east side of the range line (as negligently as did the 'LAURA MAERSK' moving downstream) while the 'BOHEMIAN CLUB' was anchored in her first position inevitably a collision would have occurred."

Whether a vessel is anchored in the channel of a navigable river so as to prevent or obstruct the passage of other vessels is a question which must be determined by her posi-

tion in the channel *when she anchors*, and not by the happening of some subsequent event, i. e. in the instant case, that at approximately 11.37 A. M. the "LAURA MAERSK", while being unlawfully navigated, came into collision with the "BOHEMIAN CLUB" at the point where she was then anchored; and since the "BOHEMIAN CLUB" was no less of an obstruction to the passage of other vessels while anchored on the easterly side of the channel than she subsequently was when anchored on the westerly side of the channel, the change in her position was an immaterial circumstance. Her length, 435 feet (Finding of Fact No. 3; R. p. 103) and the channel width—1200 feet (Findings of Fact Nos. 11 and 12; R. p. 104) both rendered it impossible for her to anchor at any point within the channel limits without presenting herself as an obstruction to other vessels lawfully under way.

In a footnote to their opinion sur rehearing (R. p. 131) the majority of the Court below directed attention to the testimony of the master of the "WHITE FLASH"—one of the three ships which passed downstream in safety while the "BOHEMIAN CLUB" was at her first anchorage—who stated that it was his intention to anchor, as soon as he could, "off the ranges", so that he would be "out of the channel of anything that was moving." That, said the majority, "was precisely what the master of the 'BOHEMIAN CLUB' did not do when he changed his place of anchorage." Apparently, therefore, the majority of the Court below were of the opinion that the master of the "BOHEMIAN CLUB" ought to have done what the master of the "WHITE FLASH" intended to do, i. e. anchor outside the channel limits, despite the fact that when the "BOHEMIAN CLUB" anchored, the redescent of the fog had blotted out all indicia of position, and that it was for precisely that reason—because he

did not know where he was, or where he would go if he kept under way, that the master of the "BOHEMIAN CLUB" anchored his vessel at the point where she then was. The "WHITE FLASH," we would add, was a small vessel, 200 feet in length (R. p. 28a), with a draft of only 9'6" (R. p. 28a); whereas the "BOHEMIAN CLUB" was 435 feet in length, and drew 27' forward, and 27'1" aft (Findings of Fact Nos. 3 and 5; R. p. 103). That the length and the draft of the "BOHEMIAN CLUB" were such that she could not have anchored outside the channel limits, even if she could have found her way and determined her position by means of the channel buoy, was conclusively pointed out by the learned trial judge (R. p. 110).

What appears to have been a misapprehension of the majority of the Court below with respect to the uncontroverted facts in the case may well have been a circumstance, therefore, which induced them to hold that the master of the "BOHEMIAN CLUB" had been guilty of a statutory fault. *But even assuming for the purposes of the argument that the* "BOHEMIAN CLUB" *where she was first anchored was not an obstruction to navigation, then the question which still remains is whether the provisions of the Act of March 3, 1899, are so rigorous and inexorable that a navigator who is compelled to anchor in the channel of a river, because of fog, must remain where he is, notwithstanding that he subsequently finds his position to be one of danger, and can venture to move his vessel to a position of safety only at the peril of being found guilty of a statutory fault, if, through circumstances beyond his control, i. e., a sudden redescent of the fog which leaves him without any indicia of position, he is again compelled to anchor at a point where his vessel is more of an obstruction to other vessels than she had previously been.*

CONCLUSION.

For the reasons stated, we therefore respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

Otto Wolff, Jr.,
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Proctor for Petitioner.

APPENDIX TO BRIEF.

Act of March 3, 1899, c. 425, sec. 15, 30 Stat. 1152; U. S. C. Title 33, Sec. 409:

> "It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as sack rafts of timber and logs in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidently or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as hereinafter provided for."

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IN THE

Supreme Court of the United States

October Term, 1942.

No. [redacted] 56

THE ATLANTIC REFINING COMPANY, Owner of the Tank Steamship "BOHEMIAN CLUB",

Petitioner,

v.

A. P. MOLLER, Claimant of the Motor Vessel "LAURA MAERSK".

Petitioner's Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

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International, 236 Chestnut St., Philadelphia

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IN THE

Supreme Court of the United States.

No. 975. October Term, 1942.

THE ATLANTIC REFINING COMPANY, OWNER OF THE TANK STEAMSHIP "BOHEMIAN CLUB",

Petitioner,

v.

A. P. MOLLER, CLAIMANT OF THE MOTOR VESSEL "LAURA MAERSK."

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The facts in this case as found by the District Court were accepted by the Circuit Court of Appeals, and are not disputed; but the question presented, which is solely one of law, i. e. whether the master of the "BOHEMIAN CLUB" had been guilty of a "statutory fault"—a violation of the provisions of the Act of March 3, 1899, has been obscured by misstatements of material facts, in the respondent's brief, to which we therefore deem it necessary respectfully to direct the attention of your Honorable Court.

I.

The Position of the "Bohemian Club."

On page 4 of its brief, the respondent says (italics supplied):

> "The District Court held that under the circumstances of the case, the 'BOHEMIAN CLUB' was justified in moving from *a safe anchored position at the edge of the channel* to her position where the collision occurred (Conclusion 2; R. 112)."

The extent to which the respondent has thus misstated the conclusion of the District Court will appear by a reference to the Record; Conclusions of Law No. 2; R. p. 112, which reads as follows:

> "2. Those in charge of the 'BOHEMIAN CLUB' were justified in moving her shortly after 10 A. M. when the fog cleared, and in anchoring her again at 10.18 when the fog again obscured indicia of position."

The respondent, again, by repeatedly asserting in its brief that the "BOHEMIAN CLUB" was anchored at 7.41 A. M. *"on the edge of the channel line"—"immediately along the edge of the channel"—"on the edge of the navigable channel"*—has sought to give emphasis to an assertion *which was not a finding* made by either the District Court or by any of the Judges in the Circuit Court of Appeals.

The facts as found by the Trial Judge (Findings of Fact Nos. 3, 9, 10, 11, 12, 20, 21 and 40; R. pp. 103 and 104), and by the Circuit Court of Appeals (Opinion: R. pp. 116 and 117), relating to the position of the "BOHEMIAN CLUB" both before she endeavored to move away from the Buoy 2-D and at the time of the collision were the following:

> The "BOHEMIAN CLUB" was 435 feet long; shortly after 10 A. M. the Buoy 2-D first became visible, and when sighted lay about 150 feet distant, at an angle of about 45 degrees off the starboard bow; at that time

the heading of the "BOHEMIAN CLUB" was approximately 30 degrees; the distance between the Bulkhead Bar Range line and the easterly boundary of the channel on which Buoy 2-D is located is about 400 feet; the distance between the Bulkhead Bar Range line and the westerly boundary of the channel is about 800 feet; the Deepwater Point Range line extends at approximately a 34 degree angle to the Bulkhead Bar Range line, the two ranges meeting at the Buoy 2-D; at 11.35 A. M. the "BOHEMIAN CLUB" was located in the channel with her bow approximately on the Bulkhead Bar Range line near its juncture with the Deepwater Point Range line, her stern tailing on or to the westward thereof, and her heading being 26 to 30 degrees. The collision occurred at about 11.37 A. M.

The course up the Bulkhead Bar Range was 9 degrees (R. p. 17a).

To assist your Honorable Court in visualizing the foregoing findings, which definitely fixed the position of the "BOHEMIAN CLUB" within the channel limits (a) immediately before lifting her anchor preparatory to moving away from the Buoy 2-D, and (b) at the time of the collision, we have transcribed on the drawing hereto attached the findings made by the Courts below, which show the "BOHEMIAN CLUB", in the position "A", before moving away from the buoy, not "on the edge of the channel line", or "immediately along the edge of the channel", but lying diagonally athwart the channel on the easterly side of the range line, 400 feet wide, headed on 30 degrees, with the Buoy 2-D, 150 feet distant, and at an angle of about 45 degrees off the "BOHEMIAN CLUB'S" starboard bow. It also shows the

"BOHEMIAN CLUB", in the position "B", at the time of the collision, headed on 30 degrees, with her bow on the range line, and her stern tailing to the westward. The scale of the drawing is 200 feet to the inch.

It is a fact, therefore, that at the time of the collision the bow of the "BOHEMIAN CLUB" was on the range line, with her stern tailing to the westward; whereas before she was moved she was canted across the channel on the easterly side of the range line, as stated on page 21 of the brief in support of our petition. The respondent has quoted that statement at the bottom of page 8 of its brief, and, contrary to the established facts in the case as found by both the Courts below, has asserted that "there is no justification whatever for such a statement either by counsel or by the dissenting Judge," and that it is an assumption which "was not accepted by the majority."

It is thus apparent that the "BOHEMIAN CLUB", while lying diagonally athwart the easterly side of the channel, was as much, if not more, of an obstruction to vessels proceeding *up stream*, and therefore obligated to keep to their starboard, or to *the easterly*, side of the channel, than she subsequently was, when on the range line, to vessels proceeding *down stream* and obligated to keep to their starboard, or to *the westerly*, side of the channel.

Article 25 of the Inland Rules of Navigation, quoted on page 22 of the brief in support of our petition, makes it mandatory, when it is safe and practical to do so, for vessels to keep to that side of the fairway or midchannel which lies on their starboard side.

In *The Victory*, 168 U. S. 410; 42 L. Ed. 519, which involved a collision between two vessels approaching each other from opposite directions, this Court held:

"Each of these vessels was entitled to presume that the other would act lawfully; would keep to her own side; * * * The rule applicable to them was that each should keep to her own starboard side of the channel."

II.

The Question Presented Is One of Law and Not One of Fact.

The majority of the Court below *did not find* that the possibility of fouling the buoy *did not exist;* they *did not find* that it was a *culpable fault* for the master of the "Bohemian Club" to endeavor to move his vessel away from the buoy; they did hold (R. p. 121) that the necessity for again anchoring, because of the density of the redescending fog, and which the majority held caused the master of the "Bohemian Club" "to violate a statutory rule", was a circumstance for which there was no "legal justification", since "merely to avoid the possibility of fouling the buoy, when his vessel would swing round on the turn of the tide, he lifted anchor and manoeuvred his boat in weather so unsettled that within five minutes after lifting anchor and when because of the density of the redescending fog, he no longer knew where he was, he found it necessary again to drop anchor." The majority, accordingly, held (R. p. 121) that the "Bohemian Club's" "*particular fault*" was an "*unjustifiable violation of a statute.*"

The necessity for anchoring was thus recognized; but it was a necessity for which the majority held there was no "legal justification", since it resulted from a manoeuvre which was "deliberately" made by the master of the "Bohemian Club" "merely to avoid the possibility of fouling the buoy."

Obviously, a manoeuvre made by a master of a vessel to avoid the possibility of fouling a buoy, *is not negligence:*

on the contrary, it is *an act of prudence.* The trial Judge held that the decision made by the master of the "Bohemian Club" was a "reasonable" one (R. p. 109); the learned dissenting Judge of the Circuit Court of Appeals said (R. p. 123) that in moving his vessel "to avoid the buoy he acted prudently. He took his vessel out of a position of positive danger while he could do so"; and there was no evidence to support a finding that the master's decision was one which nautical experience and good seamanship would condemn as unjustifiable *at the time and under the circumstances shown.*

The weather was unsettled, and therefore the master of the "Bohemian Club" had no means of knowing how long he might be compelled to remain at anchor before being able to proceed ahead. If, therefore, it was proper for him to move away from the buoy to avoid the possibility of fouling it with the change in tide, then, clearly, it was proper, if not indeed incumbent upon him, to make that manoeuvre so soon as the opportunity for doing so presented itself.

The question presented, as stated on page 5 of our petition is, therefore, whether the provisions of the Act of Congress approved March 3, 1899, are so rigorous and inexorable that a navigator who is compelled to anchor his vessel, because of fog, in the navigable channel of a river, and who, upon ascertaining during a temporary lift in the fog that his position is one of danger, inaugurates a manoeuvre to place his vessel in a position of greater safety, but who, before completing his manoeuvre, is again compelled to anchor because of a sudden redescent of the fog which blots out all indicia of position, and who thereupon anchors his vessel in a position where, unknown to

himself at the time, she obstructs the passage of other vessels on that side of the channel in which she is anchored, is, under these facts, guilty of a violation of the Act of March 3, 1899; and the determination of that question, necessarily, involves a consideration of the following:

1. Is a navigator whose vessel is anchored within the channel limits of a navigable river in a position which he regards as one of danger to himself, guilty of a culpable fault for endeavoring to move her to a position of greater safety?

2. Will he have violated the provisions of the Act of March 3, 1899, if, before completing his manoeuvre, he is again compelled to anchor, because of a sudden redescent of fog which blots out all indicia of position, at a point where he obstructs the passage of vessels proceeding *down stream.*

3. Must he be more solicitous over the possibility that a vessel may be approaching through the fog at an unlawful rate of speed, as did the "LAURA MAERSK", than for the safety of his own vessel?

4. If he is justified in anchoring, because of fog, on the *easterly* side of a channel, where he obstructs the passage of vessels proceeding *up stream*, is it material, in determining whether he has violated the Act of March 3, 1899, that where he is subsequently compelled to anchor he obstructs the passage of vessels proceeding *down stream?*

In resolving these questions against the master of the "BOHEMIAN CLUB", it is our contention that the majority of the Circuit Court of Appeals, as the learned dissenting Judge of that Court said in his opinion sur rehearing (R.

p. 132 et seq.), announced a rule of navigation which is a "very novel rule"; a rule which "misinterprets the Act of March 3, 1899"; and a rule which "renders navigation more difficult, for a vessel once anchored because of fog must remain at its first anchorage even if it be in a dangerous position until the fog has lifted, not momentarily, but completely."

We respectfully submit that the rule of navigation announced by the majority of the Circuit Court of Appeals:—

1. Is a "very novel rule", because, contrary to the fundamental consideration underlying all rules of navigation, it penalizes a navigator for inaugurating a measure of prudence when confronted with a situation which he regards as one of danger to his vessel, and is unsupported by any authority.

2. It misinterprets the Act of March 3, 1899, in that the Act is in aid of commerce and navigation, and therefore, as was said by the District Court in THE CALDY, 123 Fed. 802, (D. of Md.) affirmed 153 Fed. 837, (C. C. A. 4) "should receive a sensible construction to further that end."

3. It renders navigation more difficult in that it places a navigator in a dilemma when confronted with a situation similar to that in the instant case, and thereby induces hesitation, doubt and indecision which are so frequently the primary causes for marine disasters.

For these several reasons, we therefore respectfully submit that the Act of March 3, 1899, should be interpreted by your Honorable Court in the public interests, and as a matter of paramount importance to all navigators.

III.

The Danger of Fouling the Buoy 2-D Was Real.

The respondent states, on page 5 of its brief, that "the record is replete with testimony showing clearly that the alleged danger (i. e. of fouling the Buoy 2-D) was fancied rather than real;" but the argument submitted to support that conclusion is not in accord with the facts. The facts were these:—

When the "BOHEMIAN CLUB" anchored at 7.41 A. M. her heading was 9 degrees (R. p. 10a) and the tide was flood (R. p. 42a). The tide did not change to ebb at 9.10 A. M., as the respondent asserts, but, as the Record shows (R. p. 98), it had "finally settled down to ebb", at 9.10 A. M. During the interval from 7.41 A. M. to 9.10 A. M. the "BOHEMIAN CLUB" had swung with the incoming flood tide through an arc of 110 degrees (R. p. 43a), but by 9.10 A. M. when the tide had "finally settled down to ebb" she had swung back again and had steadied on a heading of 30 degrees (R. p. 43a). She did not foul the buoy, while swinging *for but a short interval of time* with the flood tide, because, as the testimony further shows (R. p. 48a), the change in the tide from flood to ebb is "a very gradual change",—"the force in the flood tide will gradually diminish and you will have a period of slack water"—"when there is no tide at all."

With respect to the respondent's assertion (page 6 of its brief) that the master of the "BOHEMIAN CLUB" endeavored to move away from the buoy at a time when the ebb tide had a minimum of two hours to run before a change took place", we respectfully direct attention to the fact that at 9.46 P. M. on the night preceding the date of the collision until 4.58 A. M. on the day of the collision, a period of approximately 7 hours, the "BOHEMIAN CLUB"

had been obliged to anchor on the Liston Range of the Delaware River because of fog (R. pp. 9a and 10a). Manifestly, the master of the "BOHEMIAN CLUB" had no means of knowing how long he might be obliged to remain at anchor after he first saw the Buoy 2-D off his starboard bow; and if it was proper, as we contend, for him to endeavor to move away from the buoy at all, then, necessarily, it was incumbent upon him to act so soon as an opportunity for doing so presented itself.

In a situation such as that presented in the instant case, which involved (a) the possibility of fouling the buoy, and (b) the measures to be inaugurated to avert that danger, the law is well settled that the judgment of an experienced navigator should not be condemned unless it is one which nautical experience and good seamanship would condemn as unjustifiable, not in the light of after events, but at the time and under the circumstances shown, and that every doubt must be resolved in his favor.

The Clarence L. Blakeslee (C. C. A. 2, 243 Fed. 365;
The A. P. Skidmore (C. C. A. 2), 115 Fed. 791;
The Socony No. 9 (C. C. A. 2), 74 Fed. (2d) 233;
The Battler (C. C. A. 3), 72 Fed. 537, cert. denied, 163 U. S. 697;
The Garden City (C. C. A. 6), 127 Fed. 298.

Respectfully submitted,

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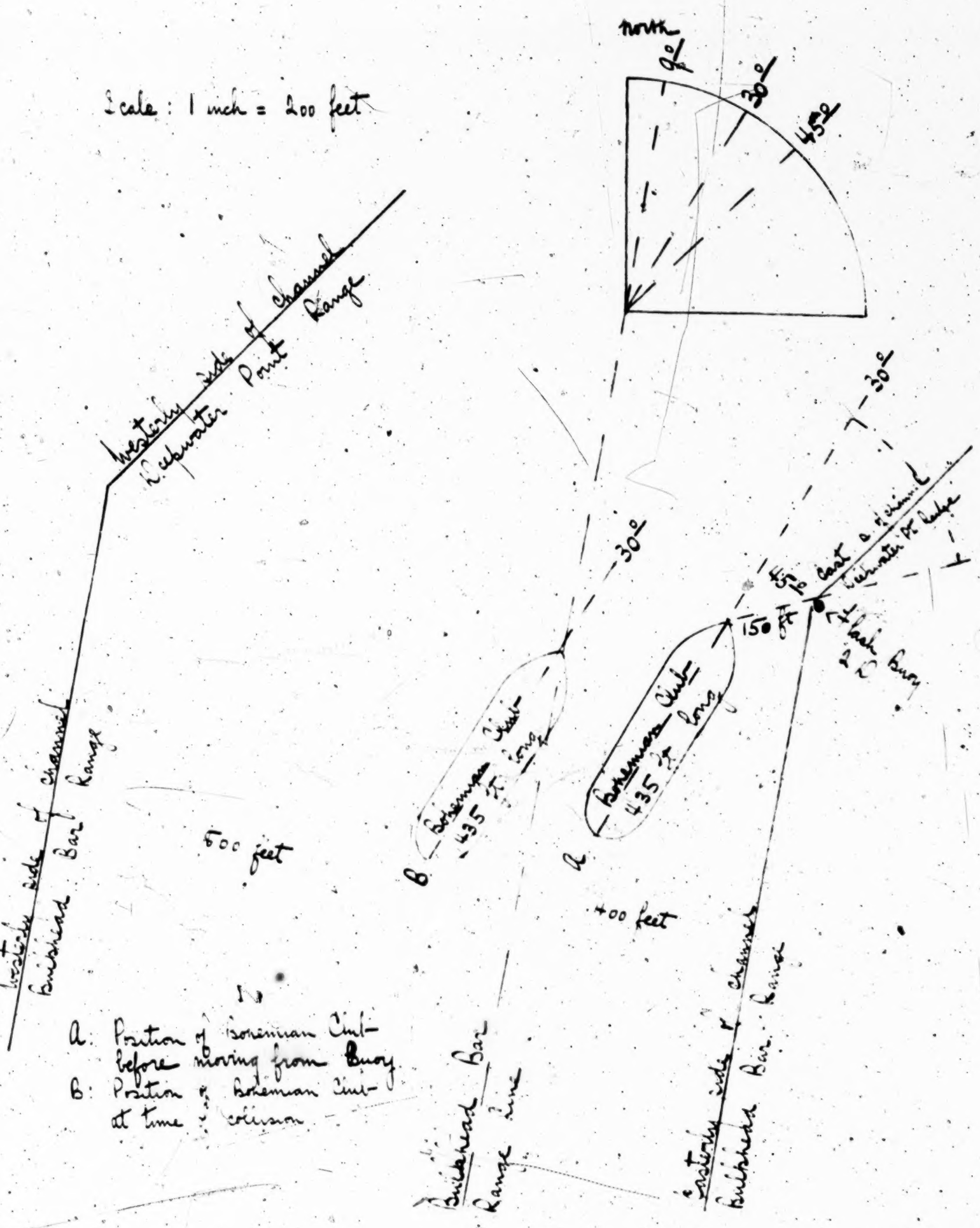

A: Position of Bohemian Club before moving from Buoy
B: Position of Bohemian Club at time of collision

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IN THE

Supreme Court of the United States

October Term, 1942.

No. 56.

THE ATLANTIC REFINING COMPANY, Owner of the Tank Steamship "BOHEMIAN CLUB",

Petitioner,

v.

A. P. MOLLER, Claimant of the Motor Vessel "LAURA MAERSK",

Respondent.

BRIEF FOR PETITIONER.

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IN THE

Supreme Court of the United States.

No. 56. October Term, 1943.

THE ATLANTIC REFINING COMPANY, OWNER OF THE TANK-STEAMSHIP "BOHEMIAN CLUB",
Petitioner,

against

A. P. MOLLER, CLAIMANT OF THE MOTOR-VESSEL "LAURA MAERSK",
Respondent.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion, findings of fact, and conclusions of law of the District Court are officially reported in 40 Fed. Supp. 641, and are printed in the record (R. 92). The opinions of the majority, and of the dissenting judge, of the Circuit Court of Appeals are officially reported in 134 Fed. (2d) 1000, and are printed in the record (R. 103 and 110; and, sur rehearing, R. 115 and 117).

JURISDICTION OF THIS COURT.

The suit is in admiralty, and involves the question of liability for a collision between two vessels on the Delaware River. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925; 34 Stat. 938; U. S. C. A. Sec. 347.

STATEMENT OF THE CASE.

(a) The Facts.

The findings of fact made by the District Court (R. 92) were accepted by the Circuit Court of Appeals as the facts in the case (p. 104) and are not disputed.

At about 7.30 A. M. on December 20, 1939, the Tank Steamship "Bohemian Club", owned and operated by the petitioner, The Atlantic Refining Company, while proceeding up the Delaware River, bound for Philadelphia, turned off the Newcastle range and into the Bulkhead Bar range section of the river, and shortly thereafter encountered a dense fog (Fdg. 7, R. 93; R. 104). No buoys were visible; there were no anchorages within five miles; and after proceeding a short distance ahead the "Bohemian Club" was anchored at 7.41 A. M. (Fdg. 8, R. 93; R. 104.)

Shortly after 10 A. M. a flash buoy, known as 2-D, on the easterly edge of the channel, at the intersection of the Bulkhead Bar and Deepwater Point ranges, first became visible to those on the "Bohemian Club" and was sighted by them about 150 feet distant, at an angle of about 45 degrees off the vessel's starboard bow (Fdg. 9, R. 93; R. 104). The tide was ebb and was due to change to flood approximately two hours later (Fdg. 13, R. 93; R. 104).

Being of the opinion that if compelled to remain at anchor where he was, his vessel would be in danger of fouling the buoy, 2-D, in swinging with the tide when it changed from ebb to flood, (R. 10), the master of the "Bohemian Club" decided to move away from the buoy, to a point further downstream (R. 3 and 10). With that intention he lifted his anchor at 10.13 A. M. (Fdg. 14, R. 93; R. 104); and in order to hold the ship's head up and to

counteract the set of the ebb tide (R. 3), which was in a southwesterly direction (Fdg. 17; R. 94), he put his engines slow ahead, for two minutes, and his rudder hard over to the right (Fdg. 14, R. 93; R. 104). At 10.15 A. M. he stopped his engines (Fdg. 14, R. 93; R. 104), and was then free with the outflowing tide, for about three minutes (R. 12) until 10.18 A. M., when, because of a sudden redescent of the fog which obscured the buoy, and thereby left him without any indicia of position, he was again forced to anchor (R. 41; Fdg. 14, R. 93; R. 105). The fog did not lift until the "LAURA MAERSK" came into collision with the "BOHEMIAN CLUB" (Fdg. 25, R. 94), and its density was such that the buoy 2-D did not again become visible until then (R. 17, 36, 55, 58). The master of the "BOHEMIAN CLUB" did not know the exact position within the channel limits where she was anchored until after the collision (R. 11; Fdg. 19, R. 94; R. 105); but the courts below found she was anchored near the intersection of the Bulkhead Bar and Deepwater Point range lines, with her bow approximately on the Bulkhead Bar range line and her stern tailing to the westward thereof (Fdg. 21, R. 94; R. 105), where they held she "presented an obstruction to the free passage of other vessels, particularly those approaching from the other range" (Fdg. 24, R. 94; R. 105). All measures required of a vessel at anchor in time of fog were taken by those in charge of the "BOHEMIAN CLUB" (Conclusion 3, R. 100); her master and third officer were stationed on her bridge; a trained and experienced seaman was on her forecastle as look-out; a black ball two feet in diameter was attached to her foretop mast stay; and her fog bell located on her forecastle head was rung rapidly for five seconds at minute intervals (Fdg. 26, R. 94; R. 105).

The "LAURA MAERSK", meanwhile, was proceeding down the Delaware River at varying speeds of from 13 to 18 knots an hour (Opinion, Circuit Court of Appeals, R. 105), and those in charge of her navigation were not aware of the presence of the "BOHEMIAN CLUB" until they saw her loom up out of the fog about 400 feet distant, bearing slightly off their port bow (Fdgs. 36 and 37, R. 95 and 96; R. 105). Before the "LAURA MAERSK" could be brought to a stop she collided with the anchored "BOHEMIAN CLUB", head on, at about 11.37 A. M. (Fdg. 40, R. 96; 106). At the time of the collision the heading of the "BOHEMIAN CLUB" had settled to 30 degrees (Fdg. 16, R. 94; R. 105).

For the purpose of assisting the Court in visualizing the findings made by the courts below with respect to the position of the "BOHEMIAN CLUB" within the channel limits (1) immediately before she lifted her anchor preparatory to moving away from the buoy 2-D, and (2) immediately before the collision, we have transcribed these findings on the drawing hereto attached. It shows the "BOHEMIAN CLUB", in the position "A", immediately before moving away from the buoy 2-D, lying diagonally across the channel on the easterly side of the Bulkhead Bar range line, headed on 30 degrees (Fdg. 10, R. 93; R. 104), with the buoy at an angle of 45 degrees off her starboard bow, and 150 feet distant (Fdg. 9, R. 93; R. 104). It also shows the "BOHEMIAN CLUB", in the position "B" immediately before the collision, headed on 30 degrees (Fdg. 16, R. 94; R. 104) with her bow on the Bulkhead Bar range line, near its juncture with the Deepwater Point range line, and with her stern tailing to the westward

thereof (Fdg. 21, R. 94; R. 105). It also shows:—the course, 9 degrees up the Bulkhead Bar range line (R. 16); the 34 degree turn from the Bulkhead Bar range into the Deepwater Point range (Fdg. 20, R. 94; R. 104); the channel width on the easterly side of the Bulkhead Bar range line, 400 feet (Fdg. 11, R. 93; R. 104); and the channel width on the westerly side of the Bulkhead Bar range line, 800 feet (Fdg. 12, R. 93; R. 104). The scale of the drawing is 200 feet to the inch.

(b) The Proceedings in the Courts Below.

The petitioner, The Atlantic Refining Company, as owner of the "BOHEMIAN CLUB", instituted a suit in admiralty in the District Court of the United States for the Eastern District of Pennsylvania against the "LAURA MAERSK", *in rem*, for the recovery of damages, in the sum of approximately $40,000.00, sustained by the "BOHEMIAN CLUB" when in collision with the "LAURA MAERSK." The respondent, A. P. Moller, denied that the collision resulted from any fault on the part of the "LAURA MAERSK", and as the managing owner and claimant of the "LAURA MAERSK", filed a cross-libel against the "BOHEMIAN CLUB" *in rem*, and against The Atlantic Refining Company *in personam*, for the recovery of damages to the "LAURA MAERSK" in the sum of approximately $15,000.

The District Court held the "LAURA MAERSK" solely at fault for the collision, and entered an Interlocutory Decree (R. 100) wherein it awarded The Atlantic Refining Company the full amount of its damages, together with interest and costs, and dismissed the respondent's cross-libel with costs. The respondent appealed.

The Circuit Court of Appeals for the Third Circuit affirmed the conclusion of the District Court that the "LAURA MAERSK" was at fault; but a majority of the Court were of the further opinion (R. 103) that the "BOHEMIAN CLUB" was guilty of a contributing statutory fault in that she had unjustifiably violated the Act of March 3, 1899, 30 Stat. 1152, U. S. C. A. Title 33, Sec. 409, which provides that it shall not be lawful for a vessel to anchor in a navigable channel in such a manner as to prevent or obstruct the passage of other vessels. The dissenting judge filed a dissenting opinion (R. 110). The petition of The Atlantic Refining Company for a rehearing was granted; and in their opinions sur rehearing the majority of the court reaffirmed their previous conclusion that the "BOHEMIAN CLUB" and the "LAURA MAERSK" were both at fault (R. 115), and the dissenting judge reiterated his previous dissent (R. 117). On March 17, 1943, the court entered a judgment (R. 119) whereby it confirmed its prior judgment of October 21, 1942, (R. 112) wherein it reversed the decree of the District Court, with costs, and remanded the cause to the District Court for further proceedings in accordance with the opinion of the court.

SPECIFICATION OF THE ASSIGNED ERRORS INTENDED TO BE URGED.

1. The Circuit Court of Appeals for the Third Circuit erred in reversing the decree of the District Court of the United States for the Eastern District of Pennsylvania.

2. The Circuit Court of Appeals for the Third Circuit erred in holding that the master of the "BOHEMIAN CLUB" was guilty of a statutory fault.

3. The Circuit Court of Appeals for the Third Circuit erred in holding that the position in which the "BOHEMIAN CLUB" was anchored at the time of the collision was a violation of a statutory rule which cannot be justified by a necessity for anchoring resulting from her change of position in foggy weather.

THE QUESTION PRESENTED TO THIS COURT BY THE PETITION FOR WRIT OF CERTIORARI.

Is a navigator, who is compelled to anchor his vessel, because of fog, in the navigable channel of a river, and who, upon ascertaining during a temporary lift in the fog that his position is one of danger, inaugurates a manoeuvre to place his vessel in a position of greater safety, but who, before completing his manoeuvre, is again compelled to anchor because of a sudden redescent of the fog which blots out all indicia of position, and who thereupon anchors his vessel in a position where, unknown to himself at the time, she obstructs the passage of other vessels on that side of the channel in which she is anchored, guilty of a violation of the Act of Congress approved March 3, 1899?

Argument.

I.

THE PROHIBITION OF THE ACT OF MARCH 3, 1899, WHICH PROVIDES THAT IT SHALL NOT BE LAWFUL FOR A VESSEL TO ANCHOR IN A NAVIGABLE CHANNEL IN SUCH A MANNER AS TO PREVENT OR OBSTRUCT THE PASSAGE OF OTHER VESSELS, IS NOT ABSOLUTE. THE VESSEL MAY HAVE AN INTEREST WHICH WILL EXCUSE HER.

The Act of March 3, 1899, c. 425, sec. 15, 30 Stat. 1152, 33 U. S. C. 409, is set out in full in the appendix hereto. The provision of the Act relevant to this proceeding reads as follows:

> "It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; * * * "

The words "prevent or obstruct", as used in the Act, have been held to connote limited restraint, rather than an absolute or complete prohibition. In *The Europe*, 190 Fed. 475 at 479, the Circuit Court of Appeals for the Ninth Circuit referring to the Act of March 3, 1899, said:

> "We also hold that the words 'prevent or obstruct', in this statute, are positive words indicative of limited restraint and of legislative intent to not interfere with the right use of waterways by imposing an absolute or unreasonable prohibition."

In *The Caldy*, 123 Fed. 802 (D. of Md.), affirmed 153 Fed. 837 (C. C. A. 4), the District Court said, p. 805:

"Unquestionably, the Act of Congress being in aid of commerce and navigation should receive a sensible construction to further that end, . . ."

And in *The City of Norfolk*, 266 Fed. 641, cert. den. 253 U. S. 491, the Circuit Court of Appeals for the Fourth Circuit said (italics supplied) at p. 644:

"* * * the statute was intended as an explicit legislative statement that the dominant use of channels is for passage and not anchoring, and it does not permit a vessel to anchor *voluntarily* in a channel * * *."

In construing the Act the Courts have, without exception, held that a vessel may have an interest which will excuse her from anchoring in a navigable channel in a manner which would otherwise be a violation of the Act.

In *The Socony No. 9*, 74 Fed. (2d) 233, the Circuit Court of Appeals for the Second Circuit held (italics supplied) p. 234:

"It is quite true that the general duty of a vessel not to anchor in a fairway (Section 409, title 33, U. S. Code), exists in a fog as well as at any other time. La Bourgogne, 86 Fed. 475 (2 C. C. A.); The Persian, 181 Fed. 439 (2 C. C. A.). But like most duties, *it is not absolute;* she may have an interest *which will excuse her;* for example, *the fog may be so dense*, the quarters so close, and a safe berth so difficult and dangerous to reach, that *the balance of advantage to all concerned makes it best to anchor where she is.* In the case at bar it was theoretically possible for the tugs to try for some Staten Island slip nearby. When questioned, the master of the Joyce Card, who was in charge, would only answer that 'with that draft of water we can't go into every pier', and that it seemed safer for his own vessel to stay where he was. *That*

was not a very convincing excuse, and yet we are disposed *to accept his judgment made at the time,* under the doctrine of A. P. Skidmore, 115 Fed. 791 (C. C. A. 2); City of Norfolk, 266 Fed. Rep. 641, 645, (C. C. A. 4) and the Northern Queen, 117 Fed. 906. * * *"

"The choice was doubtful whatever it was, and there is no such clear weight against the master's judgment, *made on the spot,* as to charge his vessels."

In *The City of Norfolk, supra,* (266 Fed. 641, 645) the Circuit Court of Appeals for the Fourth Circuit also held (italics supplied):

"Since a vessel anchored in a channel and not visible because of a fog is usually a dangerous obstruction to navigation, does the Act of 1899 forbid anchoring in a channel in a fog? * * * If the fog is so dense as to justify the master in believing that another vessel going at a moderate speed could not be seen at the distance in which he could stop his vessel, and that the two vessels would be in danger of collision, *then the master should anchor and give the statutory signals. Even if he thus obstructs the channel, he is not responsible, because it is done under necessity.* . . . If the navigator of the vessel upon careful consideration of all the circumstances, reasonably concludes that necessity requires anchorage he should not be held in fault, and in case of collision *should be held entitled to the presumption in favor of a vessel at rest against a moving vessel.*"

The decisions in cases in which vessels have been held at fault for violating the prohibition of the Act, have, in every instance, been based *not* upon the mere fact that the vessel was anchored in a navigable channel in such a manner as to prevent or obstruct the passage of other vessels,

but upon a finding that she was so anchored *without justification or excuse*. Thus:

In *The Limon* (C. C. A. 1) 35 Fed. (2d) 730, the Court held, p. 731:

> "She was not forced to this anchorage by any sudden and unavoidable emergency."

In *The Southern Cross* (C. C. A. 2) 93 Fed. (2d) 297, the Court held (italics supplied), p. 299:

> "Anchoring thus in the fairway was an obstruction to navigation and a fault which helped to bring about this collision. * * * *There was no emergency requiring her to do so.*"

In *The City of Birmingham* (C. C. A. 2) 138 Fed. 555, cert. den. 199 U. S. 607, the Court held (italics supplied), p. 559:

> "The Courts should not encourage laxity and shiftlessness by rewarding a master who places his craft in a position of danger *simply because it is too much trouble to place her in a position of safety*;"

and in denying a petition for a rehearing the Court said (italics supplied) p. 560:

> "Irrespective of the statute, the dredge was at fault in anchoring where she did at night, when there was *nothing to prevent her* from removing to a position where it would have been impossible for steamers to have reached her."

In *The Welcombe* (D. C., E. D. of N. Y.), 19 F. Supp. 874, the Court held (italics supplied), p. 875:

> "*There was no justification* for the 'Welcombe' anchoring in the channel, she had *sufficient warning of*

the fog and had *ample opportunity* to anchor at Mayport instead of anchoring as she did in the channel."

In *The Itasca* (D. C. S. D. of Ga.) 117 Fed. 885, the Court held (italics supplied), p. 886:

> "The libellants violated the law, in that the dredge anchored in a deep navigable portion of the channel, in violation of the Act of Congress, approved March 3, 1899, *when she could have been readily hauled out into water where the* ITASCA *could not possibly have gone.*"

In *The Lehigh*, 15 Fed. Supp., 425 (E. D. of N. Y.), affirmed 84 Fed. (2d) 1002 (C. C. A. 2), the District Court for the Eastern District of New York held (italics supplied), p. 426:

> "The fact that the fog came up suddenly did not justify the 'BARWICK' in anchoring immediately, but it was her duty to seek proper anchorage. *Such an anchorage was available.*"

In the light of these authorities, we therefore respectfully submit, the first question to be determined in the instant case is whether or not the "BOHEMIAN CLUB" encountered an emergency which required her to anchor where and when she did.

II.

THE "BOHEMIAN CLUB" WAS FORCED TO ANCHOR IN THE NAVIGABLE CHANNEL OF THE DELAWARE RIVER BECAUSE OF FOG.

When the "BOHEMIAN CLUB" was first anchored at 7.41 A. M. she was in the navigable channel of the Delaware River, on the easterly side of the Bulkhead Bar range line; and when, following her brief maneuver to shift her

position away from the Buoy 2-D, she again anchored at 10.18 A. M., her bow was on the range line, with "her stern tailing on or to the westward thereof" (Finding 21; R. 94).

The District Court and the Circuit Court of Appeals were both of the opinion that she was without fault in anchoring where she did at 7.41 A. M. (District Court, Conclusion I, R. 100). The Circuit Court of Appeals held (R. 116):

> "The trial judge found, and we have already adopted the finding, that the 'BOHEMIAN CLUB's' second anchorage was made 'in such a manner as to present an obstruction to the free passage of other vessels, particularly ones approaching from the other range.' But the trial judge did not find, nor do we, that the 'BOHEMIAN CLUB's' first anchorage similarly offended."

The necessity for anchoring the vessel at 7.41 A. M. was apparent. The fog was so thick that there was no visibility at all (R. I, 46); the nearest anchorage grounds were four or five miles distant (R. 47); and none of the channel buoys, which were the vessel's only aids to navigation, were visible (R. 46).

Before the 'BOHEMIAN CLUB" lifted her anchor at 10.13 A. M., preparatory to moving away from the buoy 2-D, the buoy had been visible for about 5 or 10 minutes (R. 58), but a sudden redescent of the fog, at 10.18 A. M., obscured it entirely (R. 17, 48, 55). The Circuit Court of Appeals held (R. 104-105):

> "At 10.15 A. M. her engines were stopped and at 10.18 A. M. her anchor was dropped, as the fog had again set in to the extent of obscuring buoy 2-D entirely."

The fog did not lift, and the buoy 2-D did not again become visible, until the "LAURA MAERSK" came into collision with the "BOHEMIAN CLUB" (R. 17, 36, 55, 58; Fdg. 25,

R. 94), while the "BOHEMIAN CLUB" was still lying at anchor (Opinion R. 92).

But although the majority of the Circuit Court of Appeals recognized the necessity for again anchoring the "BOHEMIAN CLUB" at 10.18 A. M., they, nevertheless, held (R. 109):

> "Yet, merely to avoid the possibility of fouling the buoy, when his vessel would swing round on the turn of the tide, he (i. e. the master of the 'BOHEMIAN CLUB') lifted anchor and maneuvered his boat in weather so unsettled that within five minutes after lifting anchor and when, because of the density of the redescending fog, he no longer knew where he was, he found it necessary again to drop anchor. * * * The master having deliberately lain his vessel open to the peril which caused him to violate a statutory rule, may not then point to the fog for legal justification of his conduct * * * ."
>
> "In view of the tanker's particular fault (unjustifiable violation of a statute) little need be said as to its contribution to the collision."

That conclusion, said the dissenting judge of the Circuit Court of Appeals, "puts far too heavy a burden upon the master of any vessel situated as was the "BOHEMIAN CLUB" fog-bound upon the Delaware River on the morning of December 20, 1939" (R. 110); and in his dissenting opinion sur rehearing (R. 118 and 119) he further said:

> "The majority rule requires the master of the 'BOHEMIAN CLUB' to have possessed prescience, *to have had knowledge* that the 'LAURA MAERSK' would be operated negligently and to have known also that if he moved the 'BOHEMIAN CLUB' from her first anchorage he would move her into a position of danger from a negligently operated vessel moving down stream. This rule misinterprets the Act of March 3, 1899, * * * It is a very novel rule. It substitutes the Court's knowledge *post* the event for a master's judgment exercised

reasonably in an emergency. The rule renders navigation more difficult, for a vessel once anchored because of fog must remain at its first anchorage even if it be in a dangerous position, until the fog has lifted, not momentarily, but completely. I think it is unfortunate that this jurisdiction, which includes within its territorial limits one of the great rivers of the country, should embrace such a rule."

We therefore respectfully submit that the real question in the case is not whether it again became necessary to anchor the "BOHEMIAN CLUB" at 10.18 A. M., *since that was conceded*, but whether, in view of the grounds upon which the majority of the Circuit Court of Appeals held that she had unjustifiably violated the statute, the decision of her master to move away from the buoy 2-D, in order to avoid the danger of fouling it, was a statutory fault.

III.

THE DECISION OF THE MASTER OF THE "BOHEMIAN CLUB" TO MOVE HIS VESSEL AWAY FROM THE BUOY, AT THE TIME AND UNDER THE CIRCUMSTANCES SHOWN, WAS PROPER.

The Act of March 3, 1899, "being in aid of commerce and navigation", should, "unquestionably", as was said by the Court in *The Caldy*, *supra*, (p. 8 of this brief) "receive a sensible construction to further that end"; and any construction of the Act which will prohibit or discourage a navigator from instituting such precautionary measures as he may regard as essential for the safety of his own vessel, and especially when he can do so without endangering any other vessel, if such other vessel is herself being navigated with the care which the situation requires, is contrary, we respectfully submit, to the intendment of the Act and to its primary purpose to promote safety.

When the master of the "BOHEMIAN CLUB" first became aware, at about 10 A. M., that his vessel was in a posi-

tion where she would incur the danger of fouling the buoy, 2-D, if unable, because of continuing fog, to proceed up the river before the tide changed from ebb to flood, he was confronted with a situation in which his only alternative was either (1) to remain where he was, and thereby incur the risk of fouling the buoy, or (2) to move his vessel to a position of safety while the opportunity presented itself. It was a situation in which, under the prevailing weather conditions, there was little time for deliberation, as the trial judge held (R. 98). The weather was unsettled, and he therefore had no means of knowing how long he might be compelled to remain at anchor before being able to proceed ahead. Because of fog on the evening before, December 19th, while on the Liston Range section of the Delaware River, he had been obliged to anchor at 9.46 P. M., and to remain at anchor until 4.58 A. M. on the following morning—a period of approximately 7 hours (R. 8 and 9).

When he concluded to move his vessel away from the buoy he exercised the judgment of an experienced navigator;—he was licensed for all oceans, and for vessels of any tonnage, and he also held a first-class pilot's license for the Delaware Bay and River (R. 8). The trial judge held that his decision was a "reasonable" one (R. 97); and the learned dissenting judge of the Circuit Court of Appeals said (R. 111) that "in moving the tanker to avoid the buoy he acted prudently. He took his vessel out of a position of positive danger while he could do so." *There was no evidence to support any finding that his decision to move away from the buoy was either imprudent, unreasonable, or improper.* On the contrary, the respondent's contention at the trial, was *not* that the "Bohemian Club" ought to have remained at anchor where she was, but that when the fog partially lifted shortly after 10 A. M. she

ought either to have proceeded around the bend and to have anchored on the Deepwater Point Range, or ought to have sought an anchorage outside the channel limits on the Bulkhead Bar Range. As to these contentions, the learned trial judge said (R. 98):

> "It was suggested at the trial and argued later that the 'BOHEMIAN CLUB' should have proceeded around the bend and anchored on the Deepwater Point Range when the fog cleared partially shortly after 10 A. M., or should have sought an anchorage outside the Bulkhead Bar Range channel at that time. The former course, though open to the 'BOHEMIAN CLUB', was hazardous, as the fog might have obscured the buoy, as it did, before the 'BOHEMIAN CLUB' could have negotiated the turn and directed herself to a safe point of anchorage on the eastern side of the channel. The latter course was not open to the 'BOHEMIAN CLUB' because her draft was too great to risk proceeding outside the channel at that point."

That the danger of fouling the buoy was real, is apparent, we respectfully submit, from the uncontradicted facts in evidence. When the "BOHEMIAN CLUB" first anchored at 7.41 A. M. her heading was about 9 degrees (R. 10) and the tide was flood (R. 39); at 8.40 A. M. it had started to ebb (R. 90) and at 9.10 A. M. it had settled down to ebb (R. 39). During the flood stage of the tide the "BOHEMIAN CLUB" swung off as far as 110 degrees (R. 40), and at 8.10 A. M. was "lying across the channel at right angles" (R. 50). At 9.10 A. M., when the tide had settled down to ebb, she was headed on 30 degrees (R. 39), and maintained that heading until the collision occurred (R. 39). She did not foul the buoy while swinging with the flood tide because, as the testimony further shows (R. 45),

the change in the tide from flood to ebb is "a very gradual change"—"the force in the flood tide will gradually diminish and you will have a period of slack water"—"when there is no tide at all." The slack water interval, when there is no tide at all, lasts for a period of from 40 to 45 minutes (R. 50). The fact that the "BOHEMIAN CLUB" did not foul the buoy during the last stages of the flood tide therefore affords no basis for determining what might have happened had she been subjected to the full strength of the flood tide for a longer period, as she would have been had she been compelled to remain at anchor where she was at 10 A. M.

It is a fundamental principle of the maritime law that navigators are not to be charged with negligence unless they make a decision which nautical experience and good seamanship would condemn as unjustifiable at the time and under the circumstances shown.

In *The Clarence L. Blakeslee* (C. C. A. 2) 243 Fed., 365, the Court held, p. 366:

> "Navigators are not to be charged with negligence, unless they make a decision which nautical experience and good seamanship would condemn as unjustifiable at the time and under the circumstances shown. The Nannie Lamberton, 85 Fed., 983, 29 C. C. A. 519. The line of demarcation between error of judgment and negligence is indicated in The E. B. Conine, 233 Fed., 987, 147 C. C. A. 661."

In *The A. P. Skidmore* (C. C. A. 2) 115 Fed. 791 (followed in *The Crown of Galicia*, 232 Fed. 305, and in *The Socony No. 9*, 74 Fed. (2d) 233), the Court held, p. 792:

> "It is easy to say, after an accident, that something could have been done to lessen the possibility of

one. In this case the question is whether at the time and under the circumstances reasonable prudence was observed. In a case like the present the court should put itself in the position of the master at the time, and, unless it is satisfied that he did not exercise the discretion consistent with sound judgment, should refuse to condemn his mistake as a fault. *Especially should the court be slow to hold such an error of judgment a fault contributory to a collision when there need have been no collision if the other and moving vessel had been cautiously and vigilantly navigated.*"

Similarly, in *The Battler* (C. C. A. 3) 72 Fed. 537, 540, 541, certiorari denied, 163 U. S. 697, the Court held:

"But, even if the proofs did not completely vindicate the tug's choice of an anchorage, still, in view of the conflict of opinion between the two sets of nautical witnesses, and under the facts shown, the utmost that could fairly be alleged against the master of the BATTLER would be that he made a mistake of judgment, as manifested by the result. The James P. Donaldson, 19 Fed. 264." • • •

"The master of the BATTLER is to be judged by the state of affairs which existed when he acted, and not by the after event."

To the same effect, see also:

The Garden City (C. C. A. 6) 127 Fed. 298, 300;
The Socony No. 9, 74 Fed. (2d) 233, 234;
The City of Norfolk (C. C. A. 4) 266 Fed. 641, 645.

The master of the "BOHEMIAN CLUB", moreover was entitled to assume, we respectfully submit, that any vessel under way would comply with the law, and would, in accordance with the rule of law declared by this court in

The Chattahoochee, 173 U. S. 540, 548, proceed through the fog at a rate of speed which would enable her, upon sighting another vessel, to stop in time to avoid a collision. When, therefore, he concluded to move his vessel away from the buoy to a position of safety, he was under no obligation to be solicitous over the possibility that if, because of the unsettled weather conditions, he might again be obliged to anchor before completing his manoeuver, another vessel, approaching in an unlawful manner, i. e. at an excessive rate of speed, as did the "LAURA MAERSK", might come into collision with him.

In *Belden v. Chase,* 150 U. S. 674, 699, this court said (italics supplied):

> "Masters are bound to obey the rules *and entitled to rely on the assumption that they will be obeyed,* and should not be encouraged to treat the exceptions as subjects of solicitude rather than the rules."

The drawing hereto attached shows the location of the "BOHEMIAN CLUB", as fixed by the findings made by the Courts below (page 4 of this brief), within the channel limits (1) in the position "A", immediately before she moved away from the buoy, and (2) in the position "B", at the time of the collision. Before moving away from the buoy she was lying diagonally across the easterly side of the channel, 400 feet wide, where, necessarily, she obstructed the passage of vessels bound *upstream,* whose duty it was to keep to their starboard, i. e. the *easterly,* side of mid-channel, under Article 25 of the Inland Rules of Navigation, Act of June 7, 1897, 30 Stat. 101; 33 U. S. C. A. sec. 210, which reads:

> "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the

> fairway or mid-channel which lies on the starboard side of such vessel."

At the time of the collision, when her bow was on the Bulkhead Bar range line, and her stern was tailing to the westward thereof, she neither prevented or obstructed the passage of any vessel proceeding *upstream*, but the learned trial judge held (Finding 24; R. 94), presented "an *obstruction* to the *free passage* [emphasis supplied] of other vessels, particularly ones approaching from the other range", i. e. the Deepwater Point range. It can hardly be said, however, that she *prevented their passage*, since the channel on the westerly side of the Bulkhead Bar range line is 800 feet wide. Manifestly, any vessel proceeding, down stream, from the Deepwater Point range, and thus obligated to keep to her starboard, i. e. *the westerly*, side of the range line, could have passed the "BOHEMIAN CLUB" safely, with a clearance of at least 600 feet, *had she been navigated with the care which the situation required.* A vessel anchored in the navigable channel of a river is always, to some extent, an obstruction to the "free passage" of other vessels; but in *The Strathleven* (The Margaret J. Sanford), 213 Fed. 975, 977, the Circuit Court of Appeals for the Fourth Circuit, said (italics supplied):

> "If a vessel anchors at a point in the channel, where, notwithstanding such anchorage, other vessels navigated *with the care the situation requires* can safely pass, then she has neither violated the statute nor rendered herself liable under the general rules applicable to navigation *even though she has to a certain extent obstructed the channel.*"

Finally, we respectfully submit, it is always the duty of a navigator when confronted with a situation which he

believes to be one of danger to inaugurate such measures of safety as he, in the exercise of his judgment as an experienced navigator, may deem to be necessary and appropriate. That was precisely what the master of the "BOHEMIAN CLUB" did; and the maneuvers (pp. 2 and 3 of this brief) which he inaugurated in his endeavor to move away from the buoy show that he exercised a *carefully considered* judgment.

The possibility that, because of the unsettled weather conditions, he might be compelled to anchor before completing his maneuvers, was a contingency which did not, we respectfully submit, occasion any necessity for solicitude on his part. He was already, *unavoidably, because of necessity*, anchored within the channel limits in such a manner that he obstructed the passage of vessels proceeding upstream; and the possibility, therefore, that he might again be compelled to anchor, on the range line, or to the westward thereof, before completing his maneuvers away from the buoy, was a possibility which would leave him *no more of an obstruction than he had previously been.*

There was not a scintilla of evidence to sustain a finding that the decision of the master of the "BOHEMIAN CLUB" was either a culpable fault or an error of judgment. What constitutes good seamanship in any given situation, is a question which calls for expert opinion; and a court of law ought not, we respectfully submit, to substitute its own uninformed opinion for the considered judgment of an experienced navigator.

We therefore respectfully submit that in deciding to move his vessel away from the buoy, when the opportunity presented itself, the master of the "BOHEMIAN CLUB" acted

prudently; and that when within a very few minutes thereafter he was again compelled to anchor, because of the redescent of the fog which left him without any indicia of position, he did not unjustifiably violate the statute. There was no causal connection between his decision to move away from the buoy and the necessity which forced him to anchor.

IV.

THE DECISION OF THE MAJORITY OF THE CIRCUIT COURT OF APPEALS WAS INDUCED BY A MISAPPREHENSION OF THE UNCONTRADICTED FACTS IN EVIDENCE; IS UNSUPPORTED BY AUTHORITY; AND MISINTERPRETS THE ACT OF MARCH 3, 1899.

The reasons assigned by the majority of the Circuit Court of Appeals for their conclusion that the master of the "BOHEMIAN CLUB" had unjustifiably violated the prohibition of the Act of March 3, 1899, clearly show, we respectfully submit, that the majority of the Court did not have a clear conception of the uncontradicted facts in evidence.

The majority of the Court were of the opinion that since "three vessels proceeding down the river" (R. 104) had safely passed the "BOHEMIAN CLUB" before she moved, she did not prevent or obstruct the passage of other vessels at the point where she first anchored at 7.41 A. M. The three vessels in question, the "WHITE FLASH", the "FRANKLIN", and a Finnish vessel, passed her about 200 feet off (R. 7). The majority of the Court, however, failed to appreciate that the "BOHEMIAN CLUB" was then anchored on the *easterly* side of the range line, and that the three

vessels, "proceeding down the river", which passed her, were on the *westerly*, i. e. their starboard, side of the range line. The learned dissenting judge of the Court very pertinently observed (R. 118):

> "There is but one reason why the majority conclude that the Bohemian Club was not in a position of danger in the east part of the channel and was in a position of danger in the west part of the channel. The reason is that three vessels bound *downstream* passed the Bohemian Club while she was on the east side of the channel. They passed her, as would be expected, without mishap. If a vessel had attempted to move upstream on the east side of the range line (as negligently as did the Laura Maersk moving downstream) while the Bohemian Club was anchored in her first position inevitably a collision would have occurred."

In their opinion sur rehearing the majority of the court said (R. 116):

> "It is true that the later discovered presence of a buoy near at hand to the anchorage first made by the 'BOHEMIAN CLUB', plus a belief that the turn of the tide in about two hours would possibly bring the ship in contact with the buoy, presented a problem to the master of the vessel. It is also true that the master, and not a reviewing judge, was then and there in command and had the responsibility of making a decision as to the proper course of action in the circumstances, for which decision liability is not to be imposed for mere error in judgment. But it is equally our duty to pass upon that conduct afterwards, when the matter has become the subject of litigation, and to decide whether, in our judgment, what was done was done in the exercise of due care."

The majority of the court thus recognized the fundamental distinction between *negligence* and a mere *error in judgment;* and in a footnote indicated the reasons why, in their opinion, the master of the "BOHEMIAN CLUB" had not exercised due care. This footnote reads (R. 116):

> "Captain Down of the 'WHITE FLASH', a sister ship of the 'BOHEMIAN CLUB' and one of the ships which had passed downstream in safety while the 'BOHEMIAN CLUB' was at her first anchorage, testified at trial, as a witness for the libellant,—'Yes, I figured on anchoring if the weather stayed in that condition, as soon as I could, *off the ranges,* * * *'* (Emphasis supplied). But, the 'BOHEMIAN CLUB's' bow was right on the range line after she had made her second anchorage. Down also gave as 'one reason why' he had not anchored sooner than he did,—'* * * I thought I would get down as far as I could. With that draft I could anchor on the westward or eastward side *and be out of the channel of anything that was moving.*' (Emphasis supplied). Yet that was precisely what the master of the 'BOHEMIAN CLUB' did not do when he changed his place of anchorage."

It would thus appear that the majority of the court were of the opinion that the fault of the master of the "BOHEMIAN CLUB" lay in not doing what the master of the "WHITE FLASH" intended to do, i. e. "anchor off the ranges"—"out of the channel of anything that was moving"; and that conclusion, necessarily, assumes that the "BOHEMIAN CLUB" could have anchored "off the ranges", i. e. outside the channel limits. But it manifestly fails to recognize (1) that since, because of her length (483 feet 10 inches over all; Finding 4, R. 92) and her draft (27 feet forward and 27 feet 1 inch aft, Finding 5, R. 93) she would

have incurred the danger of running aground (R. 17), as the learned trial judge held (Opinion R. 98), in the shallow water outside the channel limits, had she attempted to anchor outside the channel; and that (2) within five minutes after lifting her anchor, at 10.13 A. M., she was again *forced to anchor*, at 10.18 A. M., because "the fog had again set in to the extent of obscuring buoy 2-D entirely." (Opinion, Circuit Court of Appeals, R. 105.) By no possibility, therefore, could the "BOHEMIAN CLUB" have completed the more extended maneuver to take her outside of the channel limits, even if her length and draft had made that possible.

The "WHITE FLASH", it should also be noted, was not a sister ship of the "BOHEMIAN CLUB", although both vessels were owned by the petitioner. The "BOHEMIAN CLUB", as stated, was 483 feet 10 inches in length (Finding 4, R. 92) and drew 27 feet forward and 27 feet 1 inch aft (Finding 5, R. 93); the "WHITE FLASH" was but 200 feet in length (R. 25), and her draft was only 9 feet 6 inches (R. 25). Captain Down of the "WHITE FLASH" therefore testified (R. 30):

> "With that draft I could anchor on the westward or eastward side and be out of the channel of anything that was moving;"

and again (R. 29):

> "I didn't have to keep in the channel if I didn't want to. In fact, I ran down the western side of the channel all the way down the river, frankly."

In a footnote (R. 117) to his opinion sur rehearing, the learned dissenting judge of the Court below said:

> ". . . The majority opinion quotes Captain Down of the motor vessel White Flash (one of the

vessels which passed the Bohemian Club going downstream when the Bohemian Club was anchored to the east of the range line) to the effect that the Bohemian Club could have anchored out of the channel on the Bulkhead Bar Range. An examination of the chart of the Delaware River in evidence shows the practical impossibility of such a course. Though there was some water both to the east and the west of the Bulkhead Bar Range which was deep enough to permit a vessel of the draft of the Bohemian Club to anchor, it is difficult to believe that a master could have picked it out in a fog. In addition, this deep water is so small in area and so close to shoal water or shore as to make such an operation difficult even in the best of weather."

We therefore respectfully submit that in holding that the master of the "BOHEMIAN CLUB" had unjustifiably violated the statute, the majority of the Circuit Court of Appeals rendered a decision which:—(*1*) *was induced by a misapprehension of the uncontradicted facts in evidence;* (*2*) *is unsupported by authority; and* (*3*) *misinterprets the Act of March 3, 1899, in that* (*a*) *contrary to the intendment of the Act and the fundamental considerations underlying all rules of navigation, it penalizes a navigator for inaugurating measures of precaution when confronted with a situation which he regards as one of danger to his vessel, and* (*b*) *renders navigation more difficult in that it places a navigator in a dilemma when confronted with a situation similar to that in the instant case, and thereby induces one of the principal causes for marine disasters, i. e. hesitation, doubt, and indecision as to what should be done in a time of emergency.*

V.

UNDER THE DOCTRINE OF MAJOR AND MINOR FAULT, ANY DOUBT REGARDING THE MANAGEMENT OF THE "BOHEMIAN CLUB", OR THE CONTRIBUTION OF HER FAULT, IF ANY, TO THE COLLISION, SHOULD BE RESOLVED IN HER FAVOR.

The doctrine of major and minor fault has been firmly established as a principle of maritime law.

In *Thompson v. The Great Republic*, 90 U. S. 20, 23 Wall. 20, the "Republic" overtook and came into collision with the "Cleona", proceeding ahead of her. Shortly before the collision occurred the "Cleona" changed her course, as she had a right to do, but failed to signal her intention to the "Great Republic' astern of her. This court held (p. 35)—

> "This omission was a fault, but this fault bears so little proportion to the many faults of the 'Republic'; that we do not think, under the circumstances, the 'Cleona' should share the consequences of this collision with the 'Republic.'"

In *Alexandre v. Machan*, 147 U. S. 72, two vessels were in collision in time of fog, and both were held at fault by the District Court. In affirming the decree of the Circuit Court, which held the "City of New York" solely at fault, this Court said (p. 85):—

> "In view of the recklessness with which the steamer was navigated that evening, it is no more than just that the evidence of contributory negligence on the part of a sailing vessel should be clear and convincing. Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt

with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

Similarly, in *The Victory*, 168 U. S. 410, this court held (p. 423):

> "The recognized doctrine is thus stated by Mr. Justice Brown in *The Umbria*, 166 U. S. 404, 409: 'Indeed, so gross was the fault of the "Umbria" in this connection that we should unhesitatingly apply the rule laid down in *The City of New York*, 147 U. S. 72, 85, and *The Ludvig Holberg*, 157 U. S. 60, 71, that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favor."

In the instant case, the facts which show the reckless manner in which the "LAURA MAERSK" was being navigated, as established by the testimony of her own master (R. pp. 61 to 64) appear in the opinion filed by the majority of the Circuit Court of Appeals (R. 105 to 107), which reads (italics supplied):—

> "The 'Laura Maersk', which was proceeding down the river from Philadelphia, had successively passed Deepwater Point at 11:15 A. M., the light buoy at New Castle Flats at 11:20 A. M., buoy 4-D at 11:31 A. M., and buoy 1-D (on the westerly side of the channel just above buoy 2-D) at 11:35 A. M. While the learned trial judge made no specific finding, it appears *from the testimony of the master of the 'Laura Maersk'* that she had been making speeds varying *from thirteen to eighteen knots an hour between the points above mentioned.* . . . The engines of the 'Laura Maersk' were put full speed astern and she so signalled, but

despite her effort, she collided head-on with the tanker at about 11:37 A. M., from which both ships suffered the damages claimed."

* * * * * * *

"Art. 16 of the Inland Rules of Navigation (June 7, 1897, c. 4, § 1, 30 Stat. 99, 33 U. S. C. A. § 192) provides in part that 'Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions'. . . . ."

* * * * * * *

"It seems clear to us that those in command of the 'Laura Maersk' navigated her in disregard of the requirements of the above rule under the prevailing weather conditions and that the court below properly assigned that fault as 'a cause of the collision'."

In *The Nacoochee*, 137 U. S. 331, 339, this court held:

"In the present case, the steamer discovered the schooner on her starboard bow, about 500 feet away, looming up in the fog. The speed of the schooner was about 4 knots an hour and that of the steamer between 6 and 7 knots. * * * The steamer's engines could be reversed in 12 seconds; but although they were reversed at full speed astern she had not attained backward motion when she struck the schooner. This was not the moderate speed required by the statute."

In *The Umbria*, 166 U. S. 404, this Court held:

"That the 'Umbria' was gravely in fault in the matter of speed is too clear for serious argument. She was within 12 miles of one of the most frequented harbors in the world, in the track of vessels bound into

and out of this harbor, and was running at a speed of from 16 to 19 knots an hour through an intermittent or variable fog * * *. (p. 408).

Indeed so gross was the fault of the 'Umbria' in this connection, that we should unhesitatingly apply the rule laid down in The City of New York, 147 U. S. 72, 85, and the Ludvig Holberg, 157 U. S. 60, 71, that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favor." (p. 409).

We therefore respectfully submit that the speed of the "Laura Maersk", established by the uncontradicted testimony of her own master, was so reckless and grossly excessive, and sufficient in itself to account for the disaster, that this court should, we respectfully submit, "unhesitatingly apply", as the court said in *The Victory, supra*, "the rule laid down in *Alexandre v. Machan*", and resolve in favor of the "Bohemian Club" any doubts regarding her management, or the contribution of her fault, if any, to the collision.

VI.
CONCLUSION.

The judgment of the Circuit Court of Appeals should be reversed with costs, and the cause should be remanded to that Court with directions to affirm the decree of the District Court.

Respectfully submitted,

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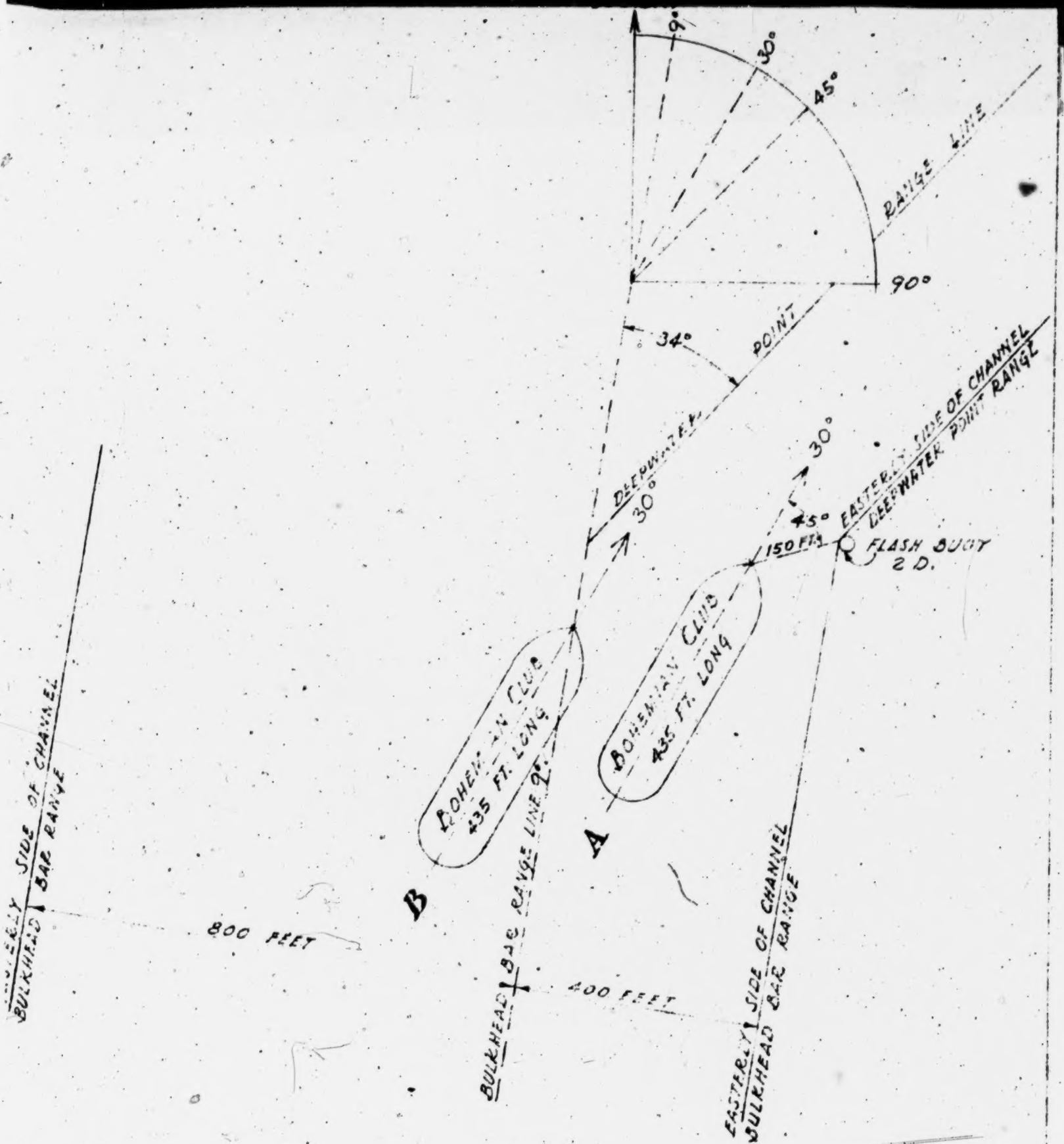
Counsel for Petitioner.

APPENDIX TO BRIEF.

Act of March 3, 1899, c. 425, sec. 15, 30 Stat. 1152; U. S. C. Title 33, Sec. 409:

> "It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as sack rafts of timber and logs in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidently or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as hereinafter provided for."



A. POSITION OF BOHEMIAN CLUB IMMEDIATELY BEFORE MOVING FROM BUOY

B POSITION OF BOHEMIAN CLUB AT TIME OF COLLISON

SCALE 1 INCH = 200 FEET

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1943.

No. 56.

THE ATLANTIC REFINING COMPANY, Owner of the Tank Steamship "BOHEMIAN CLUB",

Petitioner,

v.

A. P. MOLLER, Claimant of the M/V "LAURA MAERSK",

Respondent.

Petitioner's Reply to Respondent's Brief.

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IN THE

Supreme Court of the United States.

No. 56. October Term, 1943.

THE ATLANTIC REFINING COMPANY, OWNER OF THE TANK STEAMSHIP "BOHEMIAN CLUB,"

Petitioner,

v.

A. P. MOLLER, CLAIMANT OF THE M/V "LAURA MAERSK,"

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF.

THE QUESTION PRESENTED.

The respondent asserts (Respondent's Brief, p. 6) that the only question presented by the differing views of the Judges of the Courts below is whether the possibility that the "BOHEMIAN CLUB" might foul the buoy presented "a danger of such consequence as to justify the action of the master of the 'BOHEMIAN CLUB' in shifting his vessel at 10.13 A. M. from a position *near the easterly edge of the channel* to a position in midstream *athwart the range line,*" etc. (italics supplied); and then contends that she was moved from a position "of comparative safety" (Respondent's Brief, p. 5), to a position "in mid-channel, where she presented an obstruction to either up or down bound vessels navigating on the ranges" etc. (Respondent's Brief, p. 11).

We therefore respectfully direct the attention of the Court to the fact that the Courts below did not find that the "BOHEMIAN CLUB" moved from a position "near the easterly edge of the channel" to a position "in midstream athwart the range line." The findings were:—(1) that the "BOHEMIAN CLUB", immediately before shifting her position, was headed on approximately 30 degrees (Finding 10, R. 93), with the buoy 2-D about 150 feet distant, at an angle of about 45 degrees off the starboard bow (Finding 9, R. 93);—and since the course of the Bulkhead Bar range was 9 degrees (R. 16), the "BOHEMIAN CLUB" was, therefore, not "near the easterly edge of the channel", but was lying *athwart* the easterly side of the channel, as shown on the diagram attached to our brief; and (2) that she was moved to a position where (italics supplied) she "was located in the channel with *her bow* approximately *on* the Bulkhead Bar Range course * * * her stern tailing *to the west* as her heading was still about thirty degrees" (R. 105; Finding 21, R. 94), as likewise shown on the diagram attached to our brief.

The respondent further asserts (Respondent's Brief, p. 7):

> "The question is not whether the 'BOHEMIAN CLUB' violated the Act of Congress of March 3, 1899, (Appendix I, p. 22) for she plainly did violate the specific provisions of that Act when she anchored the second time. * * * The only question presented is whether that violation can be excused or condoned on the ground of necessity."

That it became necessary again to anchor the "BOHEMIAN CLUB" a second time, at 10.18 A. M., where she then was, is, however, not disputed by the respondent.

It became necessary, as the District Court (Finding 14, R. 93; Conclusion 2, R. 100), and the Circuit Court of Appeals (R. 104-105), both found was the fact, because of a sudden redescent of the fog which again obscured entirely the Buoy 2-D and thereafter left the master of the "BOHEMIAN CLUB" without any indicia of position. The question, therefore, is not whether anchoring the "BOHEMIAN CLUB" can be excused or condoned, since that must be conceded, but whether the decision of her master to move away from the buoy was a fault.

If it be said that the master of the "BOHEMIAN CLUB" ought to have recognized the possibility that a sudden redescent of the fog might again compel him to anchor before he had completed his maneuvers, then that is but a circumstance to be considered in determining whether his decision to move away was a fault. If his judgment, at the time and under the circumstances shown, was proper, as we contend it was, for the several reasons set forth in our brief (pp. 15 to 23), then, we respectfully submit, he is not answerable for the consequences resulting from the necessity for anchoring which subsequently arose.

THE RESPONDENT'S CONTENTION THAT THE DECISION OF THE MASTER OF THE "BOHEMIAN CLUB" TO MOVE HIS VESSEL AWAY FROM THE BUOY CANNOT BE JUSTIFIED, IS UNTENABLE.

The respondent asserts (Respondent's Brief, p. 7) that the possibility that the "BOHEMIAN CLUB" might foul the buoy involved a "relatively trivial risk," and that (Respondent's Brief p. 15):

> "Contact with a floating buoy could in no event have caused any substantial injury to a large steamer

such as the 'BOHEMIAN CLUB.' It would only have possibly resulted in dragging or displacement of the buoy."

What might have happened, had the "BOHEMIAN CLUB" fouled the buoy, is altogether speculative. She might not only have dragged or displaced the buoy, as the respondent concedes, but, in doing so, her rudder or propeller, or both, might have become entangled in the mooring cable of the buoy, in which event the "BOHEMIAN CLUB" (435 feet long; Finding No. 3; Record p. 92) would then have been helpless and out of control, and in danger of being carried by the wind and tide outside the channel limits until she grounded. And since, moreover, the Buoy 2-D was a "flashing" buoy (Respondent's Brief p. 12), and also carried a bell, as will appear from the chart attached to the Respondent's Brief, the jagged edges of its superstructure, which carried the buoy's light and bell, might have punctured the hull of the "BOHEMIAN CLUB." What might have happened the master of the "BOHEMIAN CLUB" had no means of knowing; but for the purposes of this case, we respectfully submit, the fact that, in his judgment, made on the spot, the situation was one which involved a danger to his vessel was a sufficient justification for what he undertook to do. The reasonableness of his decision to move his vessel away from the buoy was not questioned by any witness at the trial. On the contrary, as the learned Trial Judge observed (R. p. 98), the respondent itself suggested at the trial, and subsequently argued, not that the "BOHEMIAN CLUB" ought to have remained at anchor where she was, but "should have proceeded around the bend and anchored on the Deepwater Point Range when the fog cleared partially shortly after 10 A. M., or should have sought an

anchorage outside the Bulkhead Bar Range channel at that time." The propriety of moving the "BOHEMIAN CLUB" away from the buoy was thus, in effect, conceded by the respondent at the time of the trial.

We also respectfully emphasize the broader aspect of the question presented. In the interests of public safety it is essential that navigators be encouraged to be alert to the possibilities of any situation which may confront them, and to take whatever precautionary measures they may deem proper for the safety of the human lives and property entrusted to their care. The responsibility which is theirs should, we therefore respectfully submit, carry with it a wide margin of discretion, and their judgment should not be condemned save in cases where, upon clear and convincing evidence, it was manifestly faulty.

The respondent also contends that where the "BOHEMIAN CLUB" was first anchored at 7.41 A. M. her position, although within the channel limits, was "one of comparative safety" (Respondent's Brief p. 5); and that (Respondent's Brief p. 11) where she was subsequently anchored at 10.18 A. M. "she presented an obstruction to either up or down bound vessels *navigating on the ranges as is customary in these water.*" (Italics supplied.)

That vessels in these waters, whether up-bound or down-bound, customarily navigate on the ranges is an assertion *unsupported by any evidence.*

There is likewise no evidence to support the respondent's assertion (Respondent's Brief p. 9) that "it is clear" that the three vessels bound down stream, which safely passed the "BOHEMIAN CLUB" while she was anchored on

the easterly side of the range line, "passed down almost exactly on the range line, not to the west of it." The channel, on the easterly side of the Bulkhead Bar Range, was 400 feet wide (Finding 11; R. 93); the "BOHEMIAN CLUB's" bow was 150 feet from the easterly side of the channel (Finding 9; R. 93); and the three vessels in question passed her "about 200 feet off" (R. 7)—"around 200 feet off" (R. 23). But it is also to be noted that the "BOHEMIAN CLUB" was lying athwart the channel, headed on 30 degrees (Finding 10, R. 93), and that the distance from the "BOHEMIAN CLUB" at which these three vessels passed her was at best but a rough approximation. The master of the "FRANKLIN," when asked how far off she was when she passed the "BOHEMIAN CLUB" testified (R. 23):

> "Well, it is very hard to determine in a fog. I would judge around 200 feet, around the length of the 'FRANKLIN.'"

The evidence therefore fails to disclose where, with respect to the range line on the Bulkhead Bar Range, the three vessels in question were navigating. They were obligated, however, under Article 25 of the Inland Rules of Navigation, Act of June 7, 1897, 30 Stat. 101; 33 U. S. C. A. Sec. 210 (cited on page 20 of our brief) to keep to their starboard side of the fairway or mid-channel; and the presumption that they did so, in compliance with their statutory obligation, must prevail.

The "BOHEMIAN CLUB," in the position where she was first anchored at 7.41 A. M. on the easterly side of the range line, was, manifestly, an obstruction to other vessels bound up stream. The course up the Bulkhead Bar Range is 9 degrees (R. 16); but the set of the ebb tide was in a southwesterly direction (Finding 18, R. 94), and therefore when

the "BOHEMIAN CLUB" settled with the tide on 30 degrees (Finding 10, R. 93), she was lying athwart the easterly side of the channel, as shown on the diagram attached to our brief. In the position in which she was subsequently anchored at 10.18 A. M., with her bow approximately on the range line, and with her stern tailing to the westward thereof (Finding 21, R. 94), she no longer obstructed the passage of vessels bound up stream, but did, at least partially, obstruct the passage of vessels bound down stream. Her first position, therefore, was not one of "comparative safety," as the respondent contends (Respondent's Brief p. 5); but since she was under the necessity of anchoring where she did, she did not violate the provisions of the Act of Congress. We therefore respectfully submit that the subsequent change in her position to a point where she no longer obstructed the passage of vessels bound up stream, but did, at least partially, obstruct the passage of vessels bound down stream, is a matter of no consequence. If a vessel anchors in the navigable channel of a river in such a manner as to prevent or obstruct the passage of other vessels, then whether she has thereby violated the provisions of the Act of Congress approved March 3, 1899, is a question which, obviously, must be determined by the circumstances as they existed at the moment when she anchored. If she was *then* justified in anchoring, her justification continues, and she cannot thereafter be held at fault if another vessel comes into collision with her. The respondent, nevertheless, contends (Respondent's Brief p. 10):

> "The majority concede that the first anchorage, taken by necessity, might not have incurred 'liability-creating possibilities' (R. 115). The point is not important be-

> cause the collision was not with an upbound vessel and the 'LAURA MAERSK,' downbound, probably could not have complained that her passage was obstructed by the 'BOHEMIAN CLUB' while that vessel was on the easterly side of the channel."

It is to be noted that the conclusion reached by the majority of the Circuit Court of Appeals was not, that in the position of her first anchorage, the "BOHEMIAN CLUB" "*might* not have incurred liability-creating possibilities," but that she "*did not* incur liability-creating possibilities" (R. 115; italics supplied).

In contending that whether or not the "BOHEMIAN CLUB" "incurred liability-creating possibilities," in her first anchorage is not important "because the collision was not with an upbound vessel," the respondent submits an argument which implies that the course taken by another vessel which comes into collision with the anchored vessel is the decisive factor in determining whether or not the anchored vessel was anchored in violation of the provisions of the Act of March 3, 1899. The fallacy of this contention, we respectfully submit, is apparent; and since, because of her length, and the set of the tide, it would have been impossible for the "BOHEMIAN CLUB" to have anchored, at any point in the channel, without constituting herself an obstruction to the passage of other vessels, we again respectfully submit that the justification for anchoring the "BOHEMIAN CLUB" at 7.41 A. M. continued until the collision occurred, and was not affected by her subsequent change in position. She was as much of an obstruction to the passage of other vessels in her first position as she subsequently was in her second position; and she owed no

greater duty to vessels proceeding down stream than she did to vessels proceeding up stream.

The respondent contends (Respondent's Brief p. 18) that a violation of the provisions of the Act of March 3, 1899, may be condoned or justified only "under extraordinary circumstances." That, we respectfully submit, is not the construction placed upon the Act of Congress by the applicable decisions of the Circuit Court of Appeals.

In *The Socony No. 9* (C. C. A. 2) 74 Fed. 233, 234 (Petitioner's Brief pp. 9, 18, 19) the excuse given by the master of the anchored vessel for remaining at anchor in the fairway of a navigable channel in time of fog, was that "with that draft of water we can't go into every pier," and that it therefore seemed safer for his own vessel to stay where she was. The Circuit Court of Appeals for the Second Circuit held:

> "That was not a very convincing excuse, and yet we are disposed to accept his judgment made at the time, under the doctrine of *The A. P. Skidmore*, 115 Fed. 791 (2 C. C. A.); *City of Norfolk*, 266 Fed. 641, 645 (4 C. C. A.) and *Northern Queen*, 117 Fed. 906.
> * * *
> "The choice was doubtful whatever it was, and there is no such clear weight against the master's judgment, made on the spot, as to charge his vessels."

Similarly, in *The City of Norfolk* (4 C. C. A.) 266 Fed. 641, 645 (Petitioner's Brief pp. 9, 10, 19) the Circuit Court of Appeals for the Fourth Circuit, referring to the Act of March 3, 1899, held:

> "If the navigator of the vessel upon careful consideration of all the circumstances, reasonably con-

cludes that necessity requires anchorage, he should not be held at fault, and in case of collision should be held entitled to the presumption in favor of a vessel at rest against a moving vessel."

In *The Battler* (C. C. A. 3) 72 Fed. 537, 540, 541, certiorari denied, 163 U. S. 697 (Petitioner's Brief p. 19), the Circuit Court of Appeals for the Third Circuit rendered its decision on February 18, 1896, and therefore prior to the Act of March 3, 1899. The question presented, however, was whether the master of a tug had selected a safe and proper anchorage for his tug and barges while awaiting the subsidence of unfavorable weather, and was thus analogous to that in the instant case. The Court held:

"But, even if the proofs did not completely vindicate the tug's choice of an anchorage, still, in view of the conflict of opinion between the two sets of nautical witnesses, and under the facts shown, the utmost that could fairly be alleged against the master of the 'BATTLER' would be that he made a mistake of judgment, as manifested by the result. The James P. Donaldson, 19 Fed. 264."

"A mere mistake of judgment, however, under the circumstances, is not enough to fasten liability upon the owner of the tug. Id: The Packer, 28 Fed. 156."

* * *

"The master of the BATTLER is to be judged by the state of affairs which existed when he acted, and not by the after event."

Moreover, in *The Caldy*, 123 Fed. 802 (D. of Md.) affirmed 153 Fed. 837 (C. C. A. 4) (Petitioner's Brief p. 8) the District Court, referring to the Act of March 3, 1899, said (p. 805):

"Unquestionably, the Act of Congress being in aid of commerce and navigation should receive a sensible construction to further that end * * *.

"So far as concerns the liability in case of collision, the statute probably only emphasizes the previously existing maritime law. It has always been held a fault to so anchor a vessel as to unnecessarily and negligently obstruct a navigable channel. Spencer on Collisions, § 152."

We therefore respectfully submit that the Act of Congress approved March 3, 1899, should be construed with due regard to the fundamental duty of a navigator, when confronted with a situation which he believes to be one of danger, to take such precautions as he, in the exercise of his judgment as an experienced navigator may deem expedient for the safety of his vessel; and that, as the Circuit Court of Appeals for the Second Circuit held in *The Socony No. 9, supra*, his judgment, "made on the spot," should be accepted, even when the reasons assigned by him therefor are "not very convincing," and another course was "theoretically" possible.

In the instant case the "BOHEMIAN CLUB" *did not anchor voluntarily* where she did at 10.18 A. M.—she anchored *under the stress of necessity* because of the redescent of the fog. The sole question presented, therefore, is whether the decision of her master to move away from the buoy was a fault; and in determining that question, we respectfully submit, the established rule of law that navigators are not to be charged with negligence unless they make a decision which nautical experience and good seamanship would condemn as unjustifiable at the time and under the circumstances shown, should govern.

In a footnote to page 9 of their brief the respondents say that the diagram appended to the petitioner's brief "is misleading in that the dimensions of the 'BOHEMIAN CLUB' are incorrectly represented." The diagram correctly represents the findings made by the Courts below, and was intended only to illustrate these findings. The scale of the drawing is 200 feet to an inch; the "BOHEMIAN CLUB" was 435 feet long (Finding 3; R. 92); and on the diagram the "BOHEMIAN CLUB" measures exactly 2 3/16ths of an inch, i. e. 437.50 feet. The difference of 2.5 feet is negligible. The diagram was not intended to show the width or contour of the "BOHEMIAN CLUB"; the Courts below made no findings as to her width, nor does that appear in the testimony. The respondent's criticism of the width of the "BOHEMIAN CLUB," as shown on the diagram, is, however, well taken, since the "BOHEMIAN CLUB's" moulded beam was 57 feet, and her registered beam was 57.2 feet. As drawn on the diagram, therefore, the width of the "BOHEMIAN CLUB" appears as approximately twice what her width actually was. The error was inadvertent, and we respectfully ask the Court to note our correction.

Respectfully submitted,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 975 56

THE ATLANTIC REFINING COMPANY, owner of the Tank Steamship "Bohemian Club",
Petitioner,

—against—

A. P. MOLLER, Claimant of the Motor Vessel "Laura Maersk",
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LEONARD J. MATTESON,
J. HARRY LABRUM,
Proctors for Respondent.

Dated, New York, May 17, 1943.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No......

THE ATLANTIC REFINING COMPANY, owner of the Tank Steamship "Bohemian Club",

Petitioner,

—against—

A. P. MOLLER, Claimant of the Motor Vessel "Laura Maersk",

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

This case arises out of a collision in the Delaware River between the Motor Vessel "Laura Maersk" and the Tank Steamship "Bohemian Club", as the result of which a libel and cross-libel in Admiralty were filed on behalf of the respective vessels. The District Court for the Eastern District of Pennsylvania held the Motor Vessel "Laura Maersk" solely at fault (R. 103). On appeal the Circuit Court of Appeals for the Third Circuit modified this result to the extent that both the Tank Steamship "Bohemian Club" and the Motor Vessel "Laura Maersk" were held at fault (R. 115). The judgment of the Circuit

Court of Appeals was first entered on October 21, 1942. A petition for rehearing was granted on December 3, 1942 (R. 129). The judgment of the Circuit Court of Appeals confirming its judgment of October 21, 1942 was entered on March 17, 1943 (R. 130).

Jurisdiction.

Jurisdiction is provided by 28 U. S. C. 347 (a).

Facts.

At 7.41 A. M. on December 20, 1939 the Tank Steamship "Bohemian Club" which had been proceeding up the Delaware River toward Philadelphia, Pennsylvania, with a cargo of crude oil, came to anchor in a dense fog on the Bulkhead Bar Range (Findings Nos. 3, 5, 7, 8; R. 103-4). Shortly after 10.00 A. M. a partial clearing of the fog made visible Buoy 2D which is located on the easterly side of the channel at the northerly end of Bulkhead Bar Range where that reach of fairway joins Deepwater Point Range (Finding No. 9; R. 104). Buoy 2D then lay about 150 feet distant at an angle of about 45° off the "Bohemian Club's" starboard bow (Finding No. 9; R. 104).

At 10.13 A. M. the "Bohemian Club's" anchor was raised and she executed a maneuver which shifted her to the westward farther out in the channel (Findings Nos. 14, 18; R. 104-5). During the maneuver Buoy 2D once more became obscured by fog and the "Bohemian Club's" master anchored his vessel not knowing his precise position. It was subsequently ascertained that when he again dropped his anchor

at 10:18 A. M. the "Bohemian Club" lay with her bow directly on the Bulkhead Bar Range Line near its juncture with the Deepwater Point Range Line with her stern tailing to the westward of the line on a heading of approximately 30°.

At the time of the collision the "Bohemian Club" was still anchored on the range line and in such a manner as to present an obstruction to the passage of other vessels undertaking to navigate on the range line and, particularly, ones approaching from the other range (Finding 24; R. 105-6).

The Question Presented.

The question presented is stated by petitioner as follows:

> "Is a navigator, who is compelled to anchor his vessel, because of fog, in the navigable channel of a river, and who, upon ascertaining during a temporary lift in the fog that his position is one of danger, inaugurates a manoeuvre to place his vessel in a position of greater safety, but who, before completing his manoeuvre, is again compelled to anchor because of a sudden redescent of the fog which blots out all indicia of position, and who thereupon anchors his vessel in a position where, unknown to himself at the time, she obstructs the passage of other vessels on that side of the channel in which she is anchored, guilty of a violation of the Act of Congress approved March 3, 1899?"

We do not agree with this statement of the question. The real question presented is:

Was the "Bohemian Club" justified on the facts of this case in anchoring in thick fog across the range

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line in midchannel so as "to present an obstruction to the free passage of other vessels" (Finding 24; R. 105-6) in spite of the provisions of the Act of March 3, 1899, c. 425, Sec. 15, 30 Stat. 1152; U. S. C. Title 33, Sec. 409 making it unlawful to "anchor vessels or other craft in navigable channels in such manner as to prevent or obstruct the passage of other vessels or craft"?

The Decisions Below.

The District Court held that under the circumstances of the case the "Bohemian Club" was justified in moving from a safe anchored position at the edge of the channel to her position where the collision occurred (Conclusion 2; R. 112).

The majority of the Circuit Court of Appeals held that the circumstances did not justify the violation of the rule of the statute by the "Bohemian Club" (R. 121).

The dissenting judge of the Circuit Court of Appeals was of opinion that the master of the "Bohemian Club" acted prudently in moving his vessel from her original position to a position in midchannel because of danger of fouling a channel buoy on the turn of the tide (R. 123).

The case therefore involves only a difference of opinion on the part of the courts below on this point. The case involves only a question of fact decided adversely to the petitioner by the Circuit Court of Appeals.

Argument.

A. The Petitioner's Application Raises an Issue of Fact Only.

The contention of the petitioner is based upon a false premise. It is erroneously assumed that real danger existed which made it necessary to move the "Bohemian Club" away from Buoy 21). It was to avoid these supposed hazards which might result from the possibility of fouling Buoy 21) that the maneuver was undertaken which ultimately resulted in placing the "Bohemian Club" at anchor directly on the range line with her stern to the westward thereof.

The majority of the Circuit Court of Appeals correctly found that this alleged necessity was non-existent and that the maneuver was ill-chosen, having been undertaken at a time when the weather was "so unsettled that within five minutes after lifting anchor" and "when because of the density of the re-descending fog he no longer knew where he was, he found it necessary to again drop anchor" (R. 121).

The statement of the minority that "he took his vessel out of positive danger while he could do so" which forms the basis for petitioner's argument is without foundation in fact.

The record does not contain a scintilla of evidence to support such a conclusion. To the contrary, the record is replete with testimony showing clearly that the alleged danger was fancied rather than real.

The "Bohemian Club" originally anchored along the easterly end of the channel. At that time (7.41 A. M.) the tide was flood (R. 98). Approximately an hour and a half later the tide changed to ebb (9.10 A. M.) (R. 98). The "Bohemian Club" did not

foul the buoy when it swung with the tide from flood to ebb and there is no suggestion in the record that any difficulty was encountered. Yet, less than an hour after the tide had begun to ebb and at a time when the ebb tide had a minimum of two hours to run before a change took place, the "Bohemian Club" was moved from a demonstrated safe anchorage to a place where she was a "positive danger" to all vessels navigating the range.

The "positive danger" about which the petitioner speaks must relate only to the fancied danger of fouling the buoy. If such a danger actually existed, it was present at the time when the ship first anchored. It likewise was present when the vessel swung with the tide from flood to ebb. If it was a real danger, it would have manifested itself at that time. It may therefore be safely concluded that this alleged "positive danger" did not in fact exist. Certainly, there could have existed no more danger at a swing from ebb to flood than from flood to ebb. In fact, there would have been less danger to the ship, if any existed at all, because on the first swing from flood to ebb, the captain of the "Bohemian Club" acknowledged that he did not know the position of his ship while on the second swing he would have known his position by reason of his knowledge of the location of the buoy. In any case, as stated in his testimony, he could have prevented the fouling of the buoy "with the use of my engines" (R. 95).

B. On the Facts, as Found, the Decision of the Circuit Court of Appeals Is in Accord with the Controlling Authorities.

Petitioner strongly urges that the decision of the Circuit Court of Appeals in this case is in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit in the *Socony No. 9*, 74 F. (2d) 233, and the Circuit Court of Appeals for the Fourth Circuit in the *City of Norfolk*, 266 Fed. 641.

In both of these cases the court found that the action of the master in anchoring was necessary or "the better choice". In other words, the vessels were able to prove necessity and justify the violation of the statutory rule. Those cases are ruled by their particular facts and in no way conflict with the ruling of the Circuit Court of Appeals in the instant case. In the instant case the Circuit Court of Appeals found that no such necessity existed and that the maneuver undertaken at 10.13 to shift her position was ill chosen.

Where a vessel is guilty of a statutory fault, the burden rests upon her to prove that the violation of the statute was justified by reason of the rule of necessity. The "Bohemian Club" failed to meet this burden and justify its position.

Many cases support the finding of the Circuit Court of Appeals, some of which are the following:

The Caldy (D. C., D. Md., 1903) 123 Fed. 802, affirmed (C. C. A., 4th, 1907), 153 Fed. 837;

The Southern Cross (C. C. A., 2nd, 1937), 93 F. (2d) 297;

The Limon (C. C. A., 1st, 1929), 35 F. (2d) 730;

The Vera (D. C., D. Mass., 1912), 224 Fed. 998, affirmed (C. C. A., 1st, 1915), 226 Fed. 369;

The City of Birmingham (C. C. A., 2nd, 1905), 138 Fed. 555;

The Welcombe (D. C., E. D. N. Y., 1937), 19 F. Supp. 874;

The Lehigh (D. C., E. D. N. Y., 1935), 15 F. Supp. 425;

The Itasca (D. C., S. D., Ga., E. D., 1901), 117 Fed. 885;

In re Clyde-Mallory Lines (D. C., S. D. N. Y., 1937), 1937 A. M. C. 837;

The Georgia (D. C., D. R. I., 1913), 206 Fed. 635;

The Hans Maersk (C. C. A., 4th, 1937), 87 F. (2d) 193.

Petitioner under Point II of its brief in support of the petition for certiorari makes the specious contention that the "Bohemian Club" was in effect just as much of an obstruction as she lay anchored in close proximity to Buoy 2D marking the easterly boundary line of the channel as she was after she anchored at 10.18 A. M. with her bow directly on the Bulkhead Bar Range Line with her stern tailing to the westward thereof. Petitioner makes the following statement at page 21 of its brief:

> "The only difference in her position was that, at the time of the collision, her bow was on the range line with her stern tailing to the westward; whereas before she was moved she was canted across the channel on the easterly side of the

> range line, with her stern 'near to or over the range line', as the learned dissenting judge said (R. p. 133)."

There is no justification whatever for such a statement either by counsel or the dissenting judge and that assumption was not accepted by the majority. On the contrary, as the majority correctly observed in their opinion (R. 121):

> "The master also knew that, while the tanker had been so anchored for more than two hours, three vessels proceeding downstream around the turn opposite buoy 2D had passed in safety."

These were the Motor Vessels "White Flash", "Franklin" and an unidentified Finnish steamer (R. 91-2, 95-7).

A vessel anchored in the position in which the "Bohemian Club" was anchored at 7.41 A. M. on the edge of the channel line (not range line) close to Buoy 2D was not in a position such as to be a menace to vessels attempting to navigate on the range line.

The purpose of Buoy 2D was to mark the outer edge of the dredged channel. Obviously, it is most improbable that a vessel would undertake to navigate immediately along the edge of the channel where the "Bohemian Club" first anchored.

Vessels navigating either up or down the river would navigate on the range line, each giving way to the starboard thereof, as required when passing other vessels. Certainly a vessel anchored so as to be directly on this range line would be an obstruction to navigation in both directions, whereas, a vessel anchored on the edge of the navigable channel would not necessarily be an obstruction to vessels proceeding either way.

The Circuit Court of Appeals did not condemn the "Bohemian Club" for having anchored on the edge of the channel in a relatively safe position at 7.41 A. M., but, on the contrary, condemned her for having moved unnecessarily from this relatively safe anchorage to a position directly on the range line, thereby greatly increasing the hazard to such vessels as might be attempting to navigate the channel.

As was said in *The Caldy* (D. C., D. Md., 1903), 123 Fed. 802, aff'd (C. C. A., 4th, 1907), 153 Fed. 837, at page 805:

> "It has always been held a fault to so anchor a vessel as to unnecessarily and negligently obstruct a navigable channel."

The decision of the Circuit Court of Appeals very soundly holds that a navigator who through necessity has anchored his vessel in a dense fog on the edge of a navigable channel, leaving the range open to vessels which might attempt to navigate, shall not thereafter shift his vessel to a position directly on the range line, where she is a positive obstruction to vessels navigating the range, merely to avoid the possibility of fouling a buoy on the turn of the tide, anticipated some two or more hours later.

The "Bohemian Club" failed to meet the burden of proof and demonstrate that she was confronted with an "unavoidable emergency" or a "sudden exigency". The hazard was created by the "Bohemian Club" and the emergency was one which should have been anticipated and avoided. The Circuit Court of Appeals is entirely correct in finding that there was no real necessity for the "Bohemian Club" to shift her position and that the master showed poor judgment in doing so.

The testimony of the master of the "Bohemian Club" clearly indicates that there was no real hazard in the situation and no real necessity for shifting the position of the vessel. If the perils of fouling the buoy were real and not imagined they would not have arisen for several hours or until the ebb tide turned to flood.

If the Circuit Court of Appeals were to be reversed, and the "Bohemian Club" exonerated, it would be in effect a disapproval of the doctrine set forth in *The City of Norfolk* that—

> "the statute was intended as an explicit legislative statement that the dominant use of channels is for passage, and not anchorage, and it does not permit a vessel to anchor voluntarily in a channel when her presence there imperils other vessels * * *" (p. 644).

It would permit vessels to anchor in fog in the channel whether there was actual necessity or not without regard to the location in the channel and without regard to the safety of vessels undertaking to navigate.

The decision of the Circuit Court of Appeals in this case is neither in conflict with the case of the *Socony No. 9, supra*, decided by the Circuit Court of Appeals for the Second Circuit, nor *The City of Norfolk, supra*, decided by the Circuit Court of Appeals for the Fourth Circuit, nor is the result arrived at "very novel", nor does it misinterpret the Act of March 3, 1899, nor does it "render navigation more difficult", as suggested by petitioner (Petition for Writ of Certiorari, pp. 5, 6).

The decision of the Circuit Court of Appeals is amply supported by authority and no reason appears why the decisions below in this case should be reviewed by this Court.

Respectfully submitted,

LEONARD J. MATTESON,
J. HARRY LAFRUM,
Proctors for Respondent.

Dated, New York, May 17, 1943.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 56.

THE ATLANTIC REFINING COMPANY, owner of the Tank Steamship "Bohemian Club",

Petitioner,

—against—

A. P. MOLLER, claimant of the M/V "Laura Maersk",

Respondent.

BRIEF FOR RESPONDENT.

J. HARRY LA BRUM,
LEONARD J. MATTESON,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 56.

THE ATLANTIC REFINING COMPANY, owner of the Tank Steamship "Bohemian Club",

Petitioner,

—against—

A. P. MOLLER, claimant of the M/V "Laura Maersk",

Respondent.

BRIEF FOR RESPONDENT.

Opinions Below.

The opinion of the District Court containing its findings of fact and conclusions of law is officially reported at 40 F. Supp. 641 and is printed in the record herein at pages 92 to 100. The opinions of the Circuit Court of Appeals on argument and reargument are reported at 134 F. (2d) 1000 and are printed in the record herein at pages 103 to 111 and pages 115 to 119.

Jurisdiction.

Jurisdiction is provided by 28 U. S. C. 347 (a).

The Concurrent Findings of the Courts Below.

The facts were found by the District Court as follows:

On the morning of December 20, 1939, the tank steamship "Bohemian Club", which had been proceeding up

the Delaware River toward Philadelphia with a cargo of crude oil, while proceeding on the Bulkhead Bar Range, encountered a dense fog and, after proceeding a short distance, came to anchor at 7:41 A. M. (Fdgs. 5, 7 and 8, R. 93). Shortly after 10 A. M., Buoy 2-D on the easterly side of the channel at the intersection of the Bulkhead Bar and Deepwater Point Range channels first became visible through the fog about 150 feet distant at an angle of about 45° off her starboard bow (Fdg. 9, R. 93). The heading of the "Bohemian Club" was then approximately 30° (Fdg. 10, R. 93). The distance between the Bulkhead Bar Range Line and the easterly boundary of the channel, on which Buoy 2-D is located, is about 400 feet (Fdg. 11, R. 93) and the distance from the range line to the westerly boundary of the channel is about 800 feet (Fdg. 12, R. 93). The tide was ebb at the time Buoy 2-D was sighted and was due to change to flood approximately two hours later* (Fdg. 13, R. 93). In order to lie clear of Buoy 2-D when the tide turned, the "Bohemian Club" at 10:13 A. M. lifted her anchor and put her engines slow ahead with her rudder hard right. At 10:15 A. M. the engines were stopped and at 10:18 A. M. anchor was dropped, the fog having set in again obscuring the buoy (Fdg. 14, R. 93). During the above maneuver, the heading of the ship changed to the westward from 30° to 356° (Fdg. 15, R. 94). When the anchor was dropped her heading settled again at 30° which heading was maintained until immediately prior to the collision (Fdg. 16, R. 94). The set of the ebb tide was in a southwesterly direction and, as a result of this maneuver, the "Bohemian Club" was located to the westward farther into the channel (Fdgs. 17 and 18, R. 94).

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* Since the tide changed from flood to ebb at 9:10 A. M. (R. 88) this is a substantial understatement. The next change would be more than six hours later (R. 89) or after 3 P. M., at least 5 hours after the "Bohemian Club" shifted her position.

The master of the "Bohemian Club" did not know the exact position of his ship after this maneuver (Fdg. 19, R. 94).

At 11:35 A. M., the "Bohemian Club" was located in the channel with her bow approximately on the Bulkhead Bar Range line near its juncture with the Deepwater Point Range line and her stern tailing to the westward thereof (Fdg. 21, R. 94). The District Court found specifically:

> "A vessel anchored as the 'Bohemian Club' was at the time of the collision, on the range line of one range close to the angular juncture of that range with another, is anchored in such a manner as to present an obstruction to the free passage of other vessels, particularly ones approaching from the other range" (Fdg. 24, R. 94).

The "Laura Maersk" proceeded down the Delaware River at various speeds (Fdgs. 28 to 33, R. 95). At 11:34 A. M., the "Laura Maersk" stopped her engines abreast of Buoy 1-D on the westerly side of the channel at the intersection of the Deepwater Point and Bulkhead Bar Range channels (Fdg. 33, R. 95). Her rudder was put hard-a-port in order to bring her around the 34 degrees left turn into the Bulkhead Bar Range channel (Fdg. 34, R. 95). At this time fog, which had been previously intermittent, enveloped the "Laura Maersk" and her engines were put full speed astern and then stopped in order to listen for signals from other vessels (Fdg. 35, R. 95). At the moment her engines were stopped, the fog was dispelled or pierced so that the "Bohemian Club" could be seen 400 feet away (Fdg. 36, R. 95). The engines of the "Laura Maersk" were put full speed astern and she blew the appropriate signal (Fdg. 38). Nevertheless, the "Laura Maersk" and the "Bohemian Club"

collided head on at about 11:37 A. M. on or about the range line near the upper end of the Bulkhead Bar Range, both vessels suffering damage (Fdg. 40, R. 96).

These findings of fact are not disputed* and were adopted on appeal by the Circuit Court of Appeals (R. 103 to 106, 116).

The Decision of the District Court.

The District Court concluded that those in charge of the "Bohemian Club" were without fault in anchoring on the easterly side of the upper end of the Bulkhead Bar Range channel at 7:41 A. M. (Con. 1, R. 100), and that those in charge of the "Bohemian Club" were justified in moving her shortly after 10 A. M. and in anchoring her again at 10:18 (Con. 2, R. 100). The court further held that those in charge of the "Laura Maersk" were negligent and that the collision was due solely to fault on the part of the "Laura Maersk" (Con. 4 and 5, R. 100). In explanation of its conclusions, the District Court, under the heading of "Discussion", stated that the original decision of the master of the "Bohemian Club" to anchor at the easterly edge of the channel was "a wise one" (R. 97) and that his conclusion that this position was one which might result in fouling the buoy on the change of tide from ebb to flood was "reasonable" (R. 97). The District Judge further stated that the action of the master in undertaking to shift the position of his vessel, when the fog "disappeared sufficiently for the Buoy 2-D to be seen" (R. 97), and anchoring her again after only a brief interval "when the fog again obscured indicia of position" (Con. 2, R. 100) in a position athwart the range line, where she presented an obstruction to the

* Petitioner's Brief, p. 2.

free passage of other vessels, particularly vessels bound downstream (Fdg. 24), was not improper under the circumstances (R. 98).

The Decision of the Circuit Court of Appeals.

The sole difference between the decision of the Circuit Court of Appeals and the decision of the District Court is that the Circuit Court of Appeals held, on the facts as found by the District Court that *the master of the "Bohemian Club" was not justified under the circumstances* in shifting the position of his vessel from one of comparative safety to one where she obstructed the passage of other vessels. On this narrow question, Biggs, *P. J.*, dissented.

The difference between the view of the dissenting judge and the view of the majority is solely on the question as to whether the possibility of fouling the buoy on the turn of the tide was a danger of such consequence as to justify the master of the "Bohemian Club" at the time and under the circumstances in shifting from a position at his right hand edge of the channel to midstream, an action which subjected his vessel to the obviously greater danger of collision with vessels bound downstream, whose free passage the "Bohemian Club" then "particularly" obstructed (Fdg. 24, R. 94). On rehearing, the majority of the court reiterated their views first expressed (R. 115) and Biggs, *P. J.*, renewed his dissent (R. 117).

The concurrent finding of the District Court and of the Circuit Court of Appeals (as to which Biggs, *P. J.* did not dissent) that "a vessel anchored as the 'Bohemian Club' was at the time of the collision" presented "an obstruction to the free passage of other vessels, particularly ones approaching from the other range" (Fdg. 24, R. 94; R. 119) is a finding that at the time of the collision the "Bohemian

Club" was anchored in violation of the Act of Mar. 3, 1899, c. 425, §15, 30 Stat. 1152, 33 U. S. C. A. §409,* which provides that:

> "It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; * * *."

In considering the question presented, the majority of the Circuit Court of Appeals pointed out that under the rule laid down in *The Pennsylvania*, 19 Wall. (86 U. S.) 125, 136 and subsequent cases "* * * when a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been, or that it probably was not, but that it could not have been." (R. 109) Biggs, *P. J.* in his dissent did not refer to this rule.

The Question Presented.

The only question presented by the difference between the view of the majority of the Circuit Court of Appeals and that of the dissenting judge, or by the difference between the decision of the Circuit Court of Appeals and the decision of the District Court is:

> Did the possibility that the "Bohemian Club" might foul buoy 2-D on the turn of the tide some two hours or more later, present a danger of such consequence as to justify the action of the master of the "Bohemian Club" in shifting his vessel at 10:13 A. M. from a position near the easterly edge of the channel to a position

* The statute is printed in full as Appendix I to this brief, page 22.

in midstream athwart the range line in which position the "Bohemian Club" presented an obstruction to the free passage of other vessels, particularly ones approaching from the other range, as did the "Laura Maersk"?

The Question as Stated by Petitioner.

The question presented as stated by the petitioner (Petitioner's Brief, p. 7) is we believe inadequate in that it excludes any comparison of the relatively trivial risk involved in the fouling of the buoy with the much greater risk of collision with downbound vessels produced by the change of the "Bohemian Club's" position. The question is not whether the "Bohemian Club" violated the Act of Congress of March 3, 1899 (Appendix I, p. 22) for she plainly did violate the specific provision of that Act when she anchored the second time in a position which obstructed "the free passage of other vessels, particularly ones approaching from the other range" (Fdg. 24). The only question presented is whether that violation can be excused or condoned on the ground of necessity.

Petitioner's counsel recognizes the true nature of the question when he says that "the real question" is:

> "* * * whether, in view of the grounds upon which the majority of the Circuit Court of Appeals held that she had unjustifiably violated the statute, the decision of her master to move away from the buoy 2D, in order to avoid the danger of fouling it, was a statutory fault" (Petitioner's Brief, p. 15).

And again, when he says:

> "We therefore respectfully submit that in deciding to move his vessel away from the buoy, when the

opportunity presented itself; the master of the 'Bohemian Club' acted prudently * * *" (Petitioner's Brief, p. 22).

Petitioner's argument is that the decision of the Circuit Court of Appeals was induced by a "misapprehension" of the facts (Petitioner's Brief, p. 23). We shall show that this argument is not sustainable.

POINT I.

There is no substance to petitioner's assertion that the decision of the Circuit Court of Appeals was induced by a misapprehension of the uncontradicted facts in evidence.

In Point IV of petitioner's brief, p. 23, it is asserted that the decision of the majority of the Circuit Court of Appeals was induced by a misapprehension of the uncontradicted facts in evidence. The argument does not support this statement.

Petitioner's counsel states, at p. 23, that—"The majority of the court were of the opinion that since 'three vessels proceeding down the river' (R. 104) had safely passed the 'Bohemian Club' before she moved, she did not prevent or obstruct the passage of other vessels at the point where she first anchored at 7:41 A. M."

Petitioner's counsel then urges that the majority of the court "failed to appreciate that the 'Bohemian Club' was then anchored on the easterly side of the range line, and that the three vessels proceeding down the river, which passed her, were on the westerly, their starboard, side of the range line" (Petitioner's Brief, pp. 23-24).

Petitioner's counsel has clearly erred. The majority of the court did appreciate that the "Bohemian Club" was

at that time anchored on the easterly side of the range line for, in the passage from the opinion referred to, at R. 104, incompletely quoted in petitioner's brief, the majority specifically said:

> "Actually the position of the tanker, as anchored, was on the easterly side of the channel * * *" (R. 104).

Petitioner's counsel is also incorrect in stating that the vessels which passed the "Bohemian Club" were on the westerly, their starboard, side of the range line. These vessels passed, as petitioner's counsel states, about 200 ft. off (Petitioner's Brief, p. 23; R. 7, 22, 23, 29). As the "Bohemian Club" was then anchored 150 ft. from the easterly side of the channel (Fdg. 9, R. 93) which is approximately 400 ft. east of the range line (Fdg. 11, R. 93) it is clear that these vessels passed down almost exactly on the range line, not to the west of it.

Petitioner's counsel then quotes (p. 24) a passage from the opinion of the dissenting judge at R. 118, in which the dissenting judge attributes to the majority the view that the "Bohemian Club" was not in a position of danger in the east part of the channel and was in a position of danger in the west part of the channel and criticises the majority pointing out that if a vessel had been negligently operated upstream on the east side of the range line while the "Bohemian Club" was anchored in her first position a collision inevitably would have occurred. Apparently petitioner's counsel endorses this criticism.*

* Appended to Petitioner's Brief is a diagram, allegedly to scale, purporting to show the two anchored positions of the "Bohemian Club". The diagram is misleading in that the dimensions of the "Bohemian Club" are incorrectly represented. According to the scale the shape representing the space occupied by the "Bohemian Club" is twice too wide and substantially too long. We shall comment on this fact further on the oral argument if necessary.

But both the dissenting judge and petitioner's counsel have misapprehended the decision of the majority. The majority concede that the first anchorage, taken by necessity, might not have incurred "liability-creating possibilities" (R. 115). The point is not important because the collision was not with an upbound vessel and the "Laura Maersk", downbound, probably could not have complained that her passage was obstructed by the "Bohemian Club" while that vessel was on the easterly side of the channel. However, when the "Bohemian Club" attempted to move, without justifiable reason, under circumstances under which she almost inevitably lost her bearings and was forced to anchor in a position where she obstructed vessels bound either up or down, and particularly those bound down, thereby greatly increasing danger of collision to herself and others, the majority said that she could no longer rely on the argument of necessity to avoid the charge of negligence. The majority in their opinion on reargument said:

> "It may be conceded that when the 'Bohemian Club' first anchored at 7:41 A. M. on the eastern side of the channel, being then unable to proceed because of the density of the fog, her action in such circumstances did not incur liability-creating possibilities. But it is quite another thing to say that, because the anchorage first taken, out of necessity, would not have furnished a basis of liability, the ship may thereafter lift anchor and maneuver about in the channel, while still obscured by fog, in the hope of finding a supposed better anchorage and then, because of the fog, anchor in the channel without knowledge of her position and in a manner so as to prevent or obstruct the passage of other vessels or craft, and still not be subject to a charge of negligence. To so hold would be to impose a hazard upon navigation which no decided case has yet done and

which we do not think would comport with the intendment of the law. See Act of March 3, 1899, c. 425, §15, 30 Stat. 1152, 33 U. S. C. A. §409" (R. 115, 116).

The downbound vessels which passed the "Laura Maersk" safely when she was anchored in her first position would surely have struck her if she had then been in the position to which she later shifted. Moreover, the possibility of danger of collision from upbound vessels is largely imaginary for vessels bound upstream below Buoy 2-D were fog bound by dense fog (R. 2, 7, 9, 10). The fog above Buoy 2-D was only intermittent (Fdg. 28, R. 95). Only downbound vessels were proceeding at the time.

It was for shifting the position of the "Bohemian Club" to the position in midchannel, where she presented an obstruction to either up or downbound vessels navigating on the ranges as is customary in these waters, and particularly to downbound vessels making the turn from the range above (Fdg. 24, R. 94), that the majority held the "Bohemian Club" at fault.

Petitioner's counsel then quotes the footnote to the opinion of the majority on rehearing (R. 116) in which the court referred to the testimony of the master of one of the downbound ships who testified that it was his intention, if the fog continued, to anchor "off the ranges * * * and be out of the channel of anything that was moving". In the footnote referred to, after quoting this testimony, the court said:

> "Yet that was precisely what the master of the 'Bohemian Club' did not do when he changed his place of anchorage."

Obviously the court meant that the "Bohemian Club" did not anchor "off the ranges" but, on the contrary, anchored precisely on the range line. However, petitioner's counsel

argues from this statement that the majority of the Circuit Court of Appeals intended to hold the master of the "Bohemian Club" at fault for not anchoring outside the channel limits. He says:

> "It would thus appear that the majority of the court were of the opinion that the fault of the master of the 'Bohemian Club' lay in not doing what the master of the 'White Flash' intended to do, *i. e.*, 'anchor off the ranges'—'out of the channel of anything that was moving'; and that conclusion, necessarily assumes that the 'Bohemian Club' could have anchored 'off the ranges', *i. e., outside the channel limits*" (p. 25).

Counsel thereupon cites evidence to show that the "Bohemian Club" could not have anchored outside the channel limits because of her draft and the danger of running aground (Petitioner's pp. 25-26). It is, therefore, argued that the decision of the majority placed an impossible burden on the "Bohemian Club".

The assumption of petitioner's counsel that there is no difference between anchoring "off the ranges" and "outside the channel limits" is clearly erroneous. We append to this brief (Appendix II) an excerpt from the U. S. C. & G. S. chart covering this locality, showing the channels and the ranges. It will be noted that the range line is an imaginary line on which a vessel navigates approximately in midchannel in each of the channel reaches. The range lines are indicated by markers or lights at one, or the other, or both ends of each channel reach. The channel limits are substantially to either side of the range lines, the distance being dependent on the width of the channel and the locality. The channel limits are marked by buoys which are placed along the channel boundaries. Flashing buoys, such as 2-D, mark channel intersections. It is obviously quite possible for a vessel to anchor off the ranges and consequently out of the usual track of vessels bound

up or down and still be within the channel limits. The terms "off the ranges" and "outside the channel limits" are not synonymous, as petitioner's counsel would have the court believe.

It is entirely clear from the opinions of the majority that they were not laying an obligation on the "Bohemian Club" to have anchored outside the channel altogether. The majority said on rehearing:

> "But the district judge did not find, nor do we, that the 'Bohemian Club's' first anchorage similarly offended. Indeed such a broad finding would be unwarranted on the record in this case * * *" (R. 116).

The passage shows clearly that the majority did not hold the "Bohemian Club" at fault because she failed to move entirely outside the channel limits for she was within the channel limits when she first anchored.

The majority did hold that with respect to this collision with the "Laura Maersk", a downbound vessel, the "Bohemian Club" was guilty of fault because she unjustifiably moved from a position at the easterly side of the channel, of which the "Laura Maersk" could not have complained, to a position athwart the range line, where she obstructed the free passage of vessels in either direction and particularly those, such as the "Laura Maersk", approaching from the other range.

The charge that the majority of the Circuit Court of Appeals either misapprehended the facts or laid an impossible burden on the "Bohemian Club" is, we submit, not substantiated.

The other charges in Point IV, namely, that the decision of the majority is unsupported by authority and misinterprets the Act of March 3, 1899, we shall show, are equally unsound.

POINT II.

The violation of the statute by the "Bohemian Club" cannot be justified and is inexcusable.

The nature of the argument for the petitioner in this case unfortunately requires a discussion of the evidence.

When the "Bohemian Club" originally anchored along the easterly side of the channel at 7:41 A. M., the tide was flood (R. 88). Approximately an hour and a half later the tide changed to ebb (9:10 A. M.) (R. 88). The "Bohemian Club" did not foul the buoy when it swung with the tide from flood to ebb (R. 89) and there is no suggestion in the record that any difficulty was encountered. Yet, less than an hour after the ebb tide had begun to run, the "Bohemian Club" was moved from a comparatively safe anchorage to a place where she was a positive danger to all vessels navigating in either direction on the Bulkhead Bar Range. The majority of the Circuit Court of Appeals correctly found that there was no real existing necessity to move the "Bohemian Club" and that the maneuver which the master elected to undertake was ill chosen when "merely to avoid the possibility of fouling the buoy * * * he lifted anchor and maneuvered his boat in weather so unsettled that within five minutes after lifting anchor and when, because of the density of the redescending fog, he no longer knew where he was, he found it necessary to again drop anchor" (R. 109).

The statement contained in the opinion of the dissenting judge that "he took his vessel out of positive danger while he could do so" (R. 111), which forms the basis for petitioner's argument here, is without foundation in fact. The "positive danger" referred to was only the fancied danger of fouling the buoy.* Such a danger if

* No one but Biggs, *P. J.*, has suggested that there was danger that the ship might have gone aground.

it existed was trivial. Contact with a floating buoy could in no event have caused any substantial injury to a large steamer such as the "Bohemian Club". It would only have possibly resulted in dragging or displacement of the buoy. If such a danger actually existed, it was present at the time when the ship first anchored. It likewise was present when the vessel swung with the change of the tide from flood to ebb. If it was a real danger, it would have manifested itself at that time. It may therefore be safely concluded that this alleged "positive danger" did not in fact exist. Certainly, there could have existed no more danger at a swing from ebb to flood than from flood to ebb. In fact, there would have been less danger to the ship, if any existed at all, because on the first swing from flood to ebb, the captain of the "Bohemian Club" acknowledged that he did not know the position of his ship while on the second swing he would have known his position by reason of his knowledge of the location of the buoy. In any case, as stated in his testimony, he could have prevented the fouling of the buoy "with the use of my engines" (R. 85). Obviously, the majority of the Circuit Court of Appeals were justified in minimizing the alleged danger and holding that it afforded no justification for the change of the "Bohemian Club's" position to one presenting a much greater danger, *i. e.*, of collision with down bound vessels.

Under the circumstances, the majority of the Circuit Court very properly found:

> "* * * That the circumstances which attended the collision are incapable of absolving the 'Bohemian Club' of liability for contributing to the cause of the collision. As the trial court found, she anchored in the channel 'in such a manner as to present an obstruction to the free passage of other vessels particularly ones approaching from the other range'. Her

action was a positive violation of a statutory rule which is not to be justified by a necessity resulting from her own deliberate choice of a change of position in foggy weather, unless it be shown that her changed position did not contribute to the collision. That the evidence fails to disclose" (R. 107).

This finding by the majority of the Circuit Court clearly determines the issues raised against the petitioner. It is further buttressed by the statements of petitioner's own witnesses to the effect that it was not safe to proceed at any time from the original anchoring at 7:41 A. M. until the time of the collision; and that the visibility at no time from that of the original anchoring until the time of collision was more than 200 ft. (Rowe, R, 4-7-8-15; 81, 82, 83; Nordskog, R. 17; Cullison, R. 23; Down, R. 25; Lyons, R. 49-50; Haman, R. 58; Walker, R. 77).

The majority of the Circuit Court of Appeals were fully cognizant of the authorities cited by the petitioner, when, in their original opinion they condemned the conduct of the master in the following language (R. 109):

"In the present instance, when the fog had lifted somewhat around 10 A. M., the master of the 'Bohemian Club' found that his vessel was anchored on the easterly side of the channel near the bend as determined by the intersecting range courses. That was plain from her position with relation to buoy 2-D which had become visible. The master also knew that, while the tanker had been so anchored for more than two hours, three vessels proceeding downstream around the turn opposite buoy 2-D had passed in safety. *Yet, merely to avoid the possibility of fouling the buoy, when his vessel would swing round on the turn of the tide, he lifted anchor and maneuvered his boat in weather so unsettled that within five min-*

utes after lifting anchor and when, because of the density of the redescending fog, he no longer knew where he was, he found it necessary again to drop anchor. As a consequence the tanker was farther out in the channel with her bow on the Bulkhead Bar Range course and her stern tailing off to the west of the course—a position particularly obstructive to vessels proceeding downstream and required to make the swing to the left in turning from the Deepwater Point Range. The master, having deliberately lain his vessel open to the peril which caused him to violate a statutory rule, may not then point to the fog for legal justification of his conduct and particularly not, when he is unable to show that his vessel's position neither prevented nor obstructed the passage of other boats in the channel." (Italics ours.)

The Court after having considered the matter a second time on reargument confirmed its decision condemning the conduct of the master of the "Bohemian Club".

It is submitted that the Court below did not err in condemning the judgment of the master and holding the "Bohemian Club" jointly at fault with the "Laura Maersk".

POINT III.

On the facts as found, the decision of the Circuit Court of Appeals is in accord with the controlling authorities.

There is no conflict in the authorities. As the petitioner points out in Point I of its brief (p. 8) it has been held that the prohibition of the Act of March 3, 1899, which provides that it shall not be lawful for a vessel to anchor in a navigable channel in such a manner as to prevent or obstruct the passage of other vessels is not

absolute. In other words, it may be condoned or justified under extraordinary circumstances. The decisions cited by the petitioner in support of this proposition are based on the facts and circumstances as they appeared in the respective cases. In the case at bar the decision of the Circuit Court of Appeals is distinguishable from these authorities because of the finding of fact made by that court that there was nothing in the circumstances of the case to justify the action of the master of the "Bohemian Club" in removing his vessel from a position of comparative safety, in close proximity to Buoy 2-D on the easterly side of the channel, to a position with her bow directly on the range line, *i. e.*, that line in the channel on which vessels proceeding either up or downstream would strive to navigate in order to maintain their proper position in the navigable channel in the river.

The decision of the Circuit Court of Appeals that the "Bohemian Club" was at fault for anchoring *without actual necessity on the range line where she constituted a positive obstruction to vessels navigating in the channel* finds support in countless authorities, some of which are the following:

The Caldy (D. C., D. Md., 1903), 123 Fed. 802, affirmed (C. C. A., 4th, 1907), 153 Fed. 837;

The Southern Cross (C. C. A., 2nd, 1937), 93 F. (2d) 297;

The Limon (C. C. A., 1st, 1929), 35 F. (2d) 730;

The Vera (D. C., D. Mass., 1912), 224 Fed. 998, affirmed (C. C. A., 1st, 1915), 226 Fed. 369;

The City of Birmingham (C. C. A., 2nd, 1905), 138 Fed. 555;

The Welcombe (D. C., E. D. N. Y., 1937), 19 F. Supp. 874;

The Lehigh (D. C., E. D. N. Y., 1935), 15 F. Supp. 425,

The Itasca (D. C., S. D., Ga., E. D., 1901), 117 Fed. 885;

In re Clyde-Mallory Lines (D. C., S. D. N. Y., 1937), 1937 A. M. C. 837;

The Georgia (D. C., D. R. I., 1913), 208 Fed. 635;

The Hans Maersk (C. C. A., 4th, 1937), 87 F. (2d) 193.

POINT IV.

Since the "Bohemian Club", at the time of the collision, was anchored in the channel in violation of the statute in such a manner as to obstruct the passage of other vessels, particularly vessels bound down, as was the "Laura Maersk", the rule of *The Pennsylvania*, 19 Wall. 125, 136, is applicable. There is a presumption that her fault, if not the sole cause, was at least a contributory cause of the disaster and the burden rests upon her to show that her fault could not have been a cause of the collision. The major and minor fault rule has no application.

In Point V of petitioner's brief, it is argued that the fault of the "Bohemian Club" was minor and that the fault of the "Laura Maersk" was gross and that consequently the court should resolve in favor of the "Bohemian Club" any doubts regarding her management, or the contribution of her fault, if any, to the collision. However, neither the Circuit Court of Appeals nor the District Court characterized the fault of the "Laura Maersk" as gross and the argument is not supported by findings or testimony. Moreover, the Circuit Court of Appeals pointed out (R. 109) that the rule laid down by this court in *The Pennsylvania*, 19 Wall. (86 U. S.) 125, 136, is applicable to the fault of the "Bohemian Club" in anchoring

athwart the range line in a position to obstruct the free passage of vessels bound either up or down the channel, since her fault was a violation of a statutory rule intended to prevent collisions. In *The Pennsylvania*, this court said at p. 136:

> "But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been."

As pointed out by the Circuit Court of Appeals, this burden the owner of the "Bohemian Club" was unable to meet. The Court said:

> "Indeed, in the light of the circumstances, it was impossible for the libellant to show that the anchorage of the tanker on the range course could not have been a cause of the collision. As found both below and here, the tanker's anchorage prevented and obstructed the free passage of other vessels on the course" (R. 110).

The rule of *The Pennsylvania* has been frequently reiterated by this Court.

> *Lie, etc.* v. *San Francisco & Portland S. S. Co.*, 243 U. S. 291, 298;
> *The Martello*, 153 U. S. 64;
> *Belden* v. *Chase*, 150 U. S. 674, 699.

This rule has been frequently applied in the various circuits:

> *Universal Ins. Co.* v. *The Coast Banker* (C. C. A. 9), 129 F. (2d) 395, 398;

Malton Oil Transfer Co. v. *The Grecian* (C. C. A. 2), 129 F. (2d) 618, 620;
General Seafoods Corp. v. *J. S. Packard Dredging Co.* (C. C. A. 1), 120 F. (2d) 117, 120.

Moreover, as pointed out in the case last cited, the so-called major and minor fault rule is "artificial and misleading unless very carefully applied". *General Seafoods Corp.* v. *J. S. Packard D. Co.*, 120 F. (2d) 117, 119. In that case, the court pointed out further (p. 119):

> "Even though the first vessel is grossly at fault, a plain fault on the part of the other vessel is not excused. *The Albert Dumois*, 1900, 177 U. S. 240, 253, 20 S. Ct. 595, 44 L. Ed. 751; *The Yamashita Kisen Kabushiki Kaisha* v. *McCormick Inter. S. S. Co.*, 9 Cir. 927, 20 F. 2d 25; *The San Simeon; supra.*"

In view of the statutory fault of the "Bohemian Club", we submit that it is clear that the "Bohemian Club" is not entitled to invoke the so-called major and minor fault rule and that that rule is inapplicable to the facts of this case.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be affirmed, with costs.

Respectfully submitted,

J. HARRY LA BRUM,
LEONARD J. MATTESON,
Counsel for Respondent.

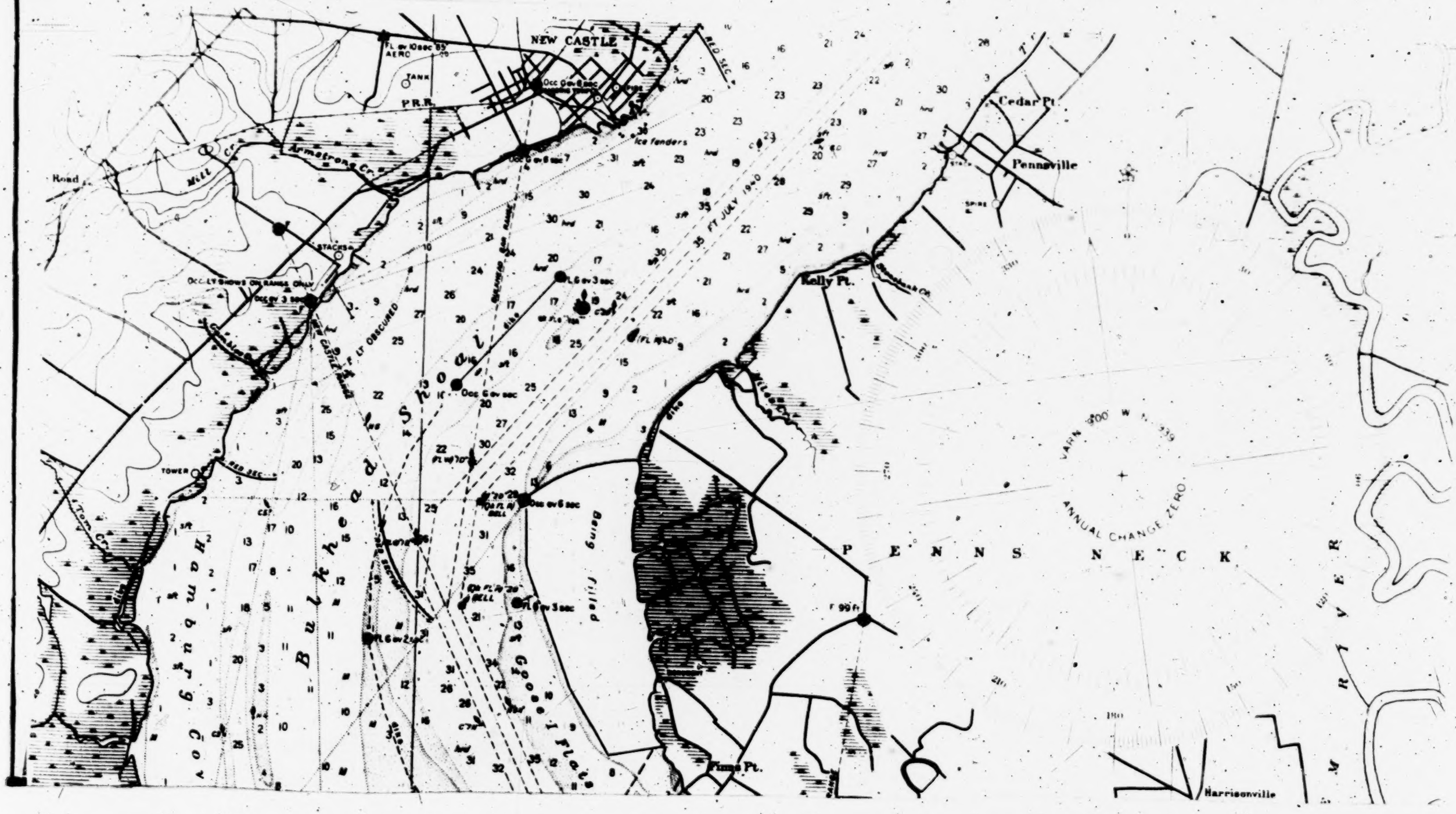
Appendix I.

Act of March 3, 1899, c. 425, Sec. 15, 30 Stat. 1152; U. S. C. Title 33, Sec. 409:

"It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as sack rafts of timber and logs in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidently or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as hereinafter provided for."

Appendix II.

Excerpt from U. S. C. & G. S. Chart No. 294.



Kelly Pt.

PENNS NECK

VARN 9°00' W (IN 1939)

ANNUAL CHANGE ZERO

Finns Pt.

Harrisonville

Fen Patch I.

Marsh Pt.

DELAWARE CITY

Bulkhead Shoal

Cabbage Island Flats

Cabbage Island Channel

Nautical Miles

Yards

Office - Supreme Court, U. S.
FILED
MAR 31 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 56.

THE ATLANTIC REFINING COMPANY, owner of the Tank Steamship "Bohemian Club",

Petitioner,

—against—

A. P. MØLLER, claimant of the M/V "Laura Maersk",

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR REHEARING.

LEONARD J. MATTESON,
Counsel for Respondent, A. P. Moller, Claimant of the Motor Vessel "Laura Maersk".

J. HARRY LA BRUM,
LEONARD J. MATTESON,
Counsel for Respondent.

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Petition for Rehearing.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The respondent, A. P. Moller, claimant of the Motor Vessel "Laura Maersk", respectfully presents this, its petition for rehearing in the above entitled cause, and in support thereof submits the following:

This court, by its decision dated December 20, 1943, reversed the judgment of the Circuit Court of Appeals in this case which, in turn, had modified the decision of the District Court.

The Decisions of the Lower Courts.

The District Court had held that the "Bohemian Club" was without fault in anchoring on the eastern side of the upper end of Bulkhead Bar Range at 7:41 A. M. (Con. 1, R. 100) and that those in charge of that vessel were justified in moving her shortly after 10 A. M. (actually 10:13 A. M., see Fdg. 14, R. 93), when the fog cleared, and in anchoring her again at 10:18, when the fog again obscured *indicia* of her position (Con. 2, R. 100).

The District Court found as a fact that in her second location the "Bohemian Club" was located in the channel with her bow approximately on the Bulkhead Bar Range line and her stern tailing to the westward thereof (Fdg. 21, R. 94) and that in this position she was "anchored in such a manner as to present an obstruction to the free passage of other vessels, particularly ones approaching from the other range" (Fdg. 24, R. 94). This finding was accepted by the Circuit Court of Appeals (R. 105, 107).

Neither the Circuit Court of Appeals nor the District Court found that the "Bohemian Club's" first anchorage similarly offended (R. 116).

The reason the District Court considered that the "Bohemian Club" was justified in shifting her position from one of comparative safety at the easterly edge of the channel to a position where she obstructed "the free passage of other vessels, particularly ones approaching from the other range", appears in that portion of the findings of the District Court headed "Discussion" where the court said:

> "When at 10:00 or shortly thereafter the fog disappeared sufficiently for the Buoy 2D to be seen, the master of the 'Bohemian Club' concluded that she was in such a position that a change in the tide

from ebb to flood would result in her fouling the buoy" (R. 97).

The majority of the Circuit Court of Appeals did not differ from the District Court on any question of law. Both recognized that the Act of March 3, 1899, Ch. 425 15, 30 Stat. 1152, 33 U. S. C. A. 409, forbidding vessels to anchor in navigable channels so as to obstruct the passage of other vessels is a "limited restraint rather than absolute or complete prohibition" (R. 107), *i. e.*, that a violation may be justified by necessity.*

The difference of opinion between the Circuit Court of Appeals and the District Court was solely on the question as to whether there was sufficient justification in the facts and circumstances of the case for the action of the master of the "Bohemian Club" in shifting his position from an anchorage at the edge of the channel, where neither court found that the "Bohemian Club" prevented or obstructed the passage of other vessels or craft, to a position athwart the range line, and failing to the westward thereof, which both courts found obstructed the passage of other vessels generally and particularly those bound down, as was the "Laura Maersk".

The majority of the Circuit Court of Appeals did not consider the possibility that the "Bohemian Club" might foul the buoy some two hours later (actually five hours**) a sufficiently imminent or serious danger to justify the action of the master of the "Bohemian Club" in shifting his vessel to a position where she obstructed the passage

* This Court pointed out that the Circuit Court of Appeals recognized that the duty imposed by Section 15 is "not absolute" (Opinion, p. 3).

** See footnote *infra*, p. 10.

of other vessels, particularly those bound down. They said on rehearing:

> "It is true that the later discovered presence of a buoy near at hand to the anchorage first made by the 'Bohemian Club', plus a belief that the turn of the tide in about two hours would possibly bring the ship in contact with the buoy, presented a problem to the master of the vessel. It is also true that the master, and not a reviewing judge, was then and there in command and had the responsibility of making a decision as to the proper course of action in the circumstances, for which decision liability is not to be imposed for mere error in judgment. But it is equally our duty to pass upon that conduct afterwards, when the matter has become the subject of litigation, and to decide whether, in our judgment, what was done was done in the exercise of due care" (R. 116).

The Decision of This Court.

In reversing the decision of the Circuit Court of Appeals, this Court said that, when the fog enveloped the "Bohemian Club" for *the second time*, the least dangerous course was to anchor on the west side of the channel, and that—

> "Under a proper construction of Section 15, therefore, the circumstances which necessitated both the first and second anchorings of the 'Bohemian Club' were equally sufficient to warrant an exception to the duty which it [Sect. 15] requires" (Opinion, p. 4).

This Court therefore concluded:

> "Whether the act of lifting anchor and moving to

the western part of the channel to avoid the danger of the buoy constituted negligence is a question wholly outside Section 15" (Opinion, p. 4).

THE DECISION OF THIS COURT CONTAINS BROAD IMPLICATIONS AND MAY BE INTERPRETED TO LAY DOWN A DANGEROUS AND UNSOUND RULE.

In basing its decision on this ground, we submit that this Court has laid down a dangerous and unsound rule. The effect of the decision is that, even though it be assumed that it was negligent for the master of the "Bohemian Club" to lift anchor and move to the western part of the channel, the "Bohemian Club" is, nevertheless, to be exonerated from fault since the actual anchoring of the vessel the second time was made necessary by the fog. The rule laid down by the Court will justify a vessel in anchoring under compulsion of fog in a position obstructing a navigable channel, no matter how serious the obstruction, no matter how little care she may have used in reaching or selecting such position, and no matter how negligent she may have been in embarking on the navigation producing this result. The rule will justify a vessel in leaving her pier in dense fog, entering a navigable channel, and anchoring in a position to obstruct seriously the passage of other vessels, even though the result could, and should, have been foreseen from the time she left her pier*; that is substantially this case.

* In the case of *The Georgia*, 208 Fed. 635 (D. C. R. I.) the S. S. "Seaconnet" was held at fault for anchoring in the channel in foggy weather on the ground that she should have stayed in port until the weather cleared.

THE UNCONTRADICTED EVIDENCE APPEARING IN THE RECORD SHOWS THAT THERE WAS EVERY REASON FOR THE MASTER OF THE "BOHEMIAN CLUB" TO ANTICIPATE THAT SOUTHBOUND TRAFFIC WOULD BE HEAVIER THAN NORTHBOUND TRAFFIC WHICH UNDER THE CONDITIONS WAS NON-EXISTENT AND CONSEQUENTLY THAT DANGER OF COLLISION WOULD BE GREATLY INCREASED BY SHIFTING THE POSITION OF THE "BOHEMIAN CLUB". THIS COURT HAS OVERLOOKED THE UNDISPUTED FACTS WHICH CLEARLY APPEAR.

The "Bohemian Club" left an anchorage at the easterly edge of the channel where she had been safely anchored from 7:41 A. M. to 10:13 A. M., more than 2½ hours (Fdgs. 8 and 14, R. 93). No upbound vessels passed or attempted to pass the "Bohemian Club" during this period or thereafter prior to the collision (R. 7). Moreover, the evidence shows that vessels bound upstream below Buoy 2-D were similarly fog-bound by the dense fog. They had anchored and were heard by the master ringing their bells astern of the "Bohemian Club" (R. 7). The fog above Buoy 2-D was only intermittent (Fdg. 28, R. 95). Only downbound vessels were proceeding at the time.

While the "Bohemian Club" lay in her first anchored position, she was passed by three downbound vessels (R. 104). These downbound vessels passed the "Bohemian Club" between 9:45 and 10 A. M., just before she shifted her position at 10:13 A. M. (R. 7). They passed about 200 feet off on her port side (R. 7, 15).

The downbound vessels which passed the "Bohemian Club" were all proceeding almost precisely on the range line, and on the course later taken by the "Laura Maersk". This appears from the fact that the "Bohemian Club" in her original position was anchored about 150 feet from the buoy, tailing to the westward (Fdgs. 9, 10, R. 93).

Taking into account her width and her angling position and the fact that the range line is located 400 feet west of the easterly boundary of the channel (Edg. 11, R. 93), it is apparent that the three downbound vessels which passed 200 feet off on her port side were proceeding almost precisely on the range line, as was also the "Laura Maersk" at the time of the collision.

It therefore appears that in shifting her position the "Bohemian Club" anchored the second time precisely in the track which her master had reason to know was being utilized by southbound vessels, the only vessels which were moving under the conditions prevailing.

This Court said in its opinion (p. 2):

> "There are no findings that the Master of the 'Bohemian Club' had any reason to believe that his vessel constituted a more dangerous obstruction to river traffic in general in her second position than in her original position."

And in the footnote to this passage, this Court commented as follows:

> "The opinion of the Circuit Court emphasizes the fact that the 'Bohemian Club' did not obstruct south bound traffic in her first position but did obstruct this traffic in her second position. Since, however, the 'Bohemian Club' obstructed the north bound traffic in her first position, this fact could not be material unless there was evidence that her Master should have anticipated that the volume of south bound traffic would be heavier than that of north bound traffic. No finding on this question is disclosed by the record."

We submit that it was clearly in the minds of the majority of the Circuit Court of Appeals that the "Bohemian Club" in her second position constituted a more dangerous obstruction to river traffic, although no specific finding was made by the Court on this point. The undisputed facts appearing clearly in the record show that this was true.

The testimony of the master of the "Bohemian Club" himself shows that he "should have anticipated that the volume of southbound traffic would be heavier than that of northbound traffic". He specifically testified that the only vessels which passed him while he was anchored were the three downbound vessels (R. 7). On his own testimony there was no reason to anticipate any upbound traffic, not only for the reason that there had been none, but because of the fact to which he testified, that he could hear the bells of upbound ships anchored astern of him in the dense fog which prevailed in the section of the river below the position where he was anchored (R. 7).

We submit, therefore, that this Court has misapprehended the uncontradicted facts shown by the record. *The decision of the Circuit Court of Appeals should not be reversed, when it is supported by the uncontradicted facts shown by the record, merely because that Court failed to refer specifically to those facts in support of its conclusions, especially when the consideration of those facts is implicit in its discussion and conclusions.*

The statement by this Court in footnote 3 on p. 2 of its opinion seems to indicate that this Court would have taken a different view of the matter and reached a different conclusion if it had been brought to the Court's attention that—

> "there was evidence that her ('Bohemian Club's') Master should have anticipated that the volume of

> southbound traffic would be heavier than that of northbound traffic."

The uncontradicted evidence shows this to have been the fact. If, in the heat of argument, counsel failed to bring this fact to the attention of the Court, it would, nevertheless, be a grave miscarriage of justice if the decision, based on a misapprehension of the facts, should stand, when the result may be corrected by further consideration on reargument.

We sincerely doubt, moreover, whether the Court intended by its decision to lay down a rule of such broad implications as seem to flow from the Court's conclusion discussed above (*supra*, p. 5) that—

> "Whether the act of lifting anchor and moving to the western part of the channel to avoid the danger of the buoy constituted negligence is a question wholly outside Section 15" (Opinion, p. 4).

We believe that in any event this Court will wish to clarify its position on this point.

We submit that the decision of the Circuit Court of Appeals was fully justified by the following considerations and should not be reversed:

1. While the "Bohemian Club" lay in her first anchorage on the easterly side of the channel for 2½ hours from 7:41 A. M. to 10:13 A. M., no upbound vessels passed or attempted to pass (R. 7).

2. During this period the fog was dense and other upbound vessels astern of the "Bohemian Club" had anchored and were heard ringing their bells (R. 7).

3. During this period and shortly before 10 A. M., three downbound vessels were seen to pass the

"Bohemian Club" about 200 feet on her port hand proceeding down the channel approximately on the range line (R. 7).

4. The sole reason given by the master of the "Bohemian Club" for shifting his anchorage at 10:13 A. M. was the supposed danger of fouling Buoy 2-D when the tide turned (R. 2, 3, 10, 11). This supposed danger was neither serious nor imminent:

   (a) The change of tide was not imminent. The change of tide from ebb to flood would not have occurred less than two, and actually not until about five hours later.*

   (b) For a ship the size of the "Bohemian Club" (6,906 gross tons official registry), to drift into contact with a moored channel buoy could, in no event, have been a serious matter since the buoy is not a fixed structure, but a comparatively small floating object, moored in place with scope of chain, and consequently capable of being pushed aside.

   (c) Contact could be in any event have been avoided by use of the ship's engines (see master's testimony, R. 85).

Under these conditions the "Bohemian Club's" first position was a safe anchorage and both the Courts below carefully refrained from finding otherwise.

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* The District Court's finding was "approximately two hours later" (Finding 13, R. 93). The master's testimony was "about three hours later" (R. 3). Since the change from flood to ebb occurred, according to the master's testimony, about 9:10 A. M. (R. 88), the change from ebb to flood would not have occurred less than six hours later, *i. e.* not before 3 P. M.

Under these circumstances, we submit that the majority of the Circuit Court of Appeals was fully justified in saying in its original opinion:

> "In the present instance, when the fog had lifted somewhat around 10 A. M., the master of the 'Bohemian Club' found that his vessel was anchored on the easterly side of the channel near the bend as determined by the intersecting range courses. That was plain from her position with relation to buoy 2-D which had become visible. The master also knew that, while the tanker had been so anchored for more than two hours, three vessels proceeding downstream around the turn opposite buoy 2-D had passed in safety. Yet, merely to avoid the possibility of fouling the buoy, when his vessel would swing round on the turn of the tide, he lifted anchor and maneuvered his boat in weather so unsettled that within five minutes after lifting anchor and when, because of the density of the redescending fog, he no longer knew where he was, he found it necessary again to drop anchor. As a consequence, the tanker was farther out in the channel with her bow on the Bulkhead Bar Range course and her stern tailing off to the west of the course—a position particularly obstructive to vessels proceeding (fol. 12) downstream and required to make the swing to the left in turning from the Deepwater Point Range. The master having deliberately lain his vessel open to the peril which caused him to violate a statutory rule, may not then point to the fog for legal justification of his conduct and particularly not, when he is unable to show that his vessel's position neither prevented nor obstructed the passage of other boats in the channel" (R. 109)

and was equally justified in saying upon reargument:

> "It may be conceded that when the 'Bohemian Club' first anchored at 7:41 A. M. on the eastern side of the channel, being then unable to proceed because of the density of the fog, her action in such circumstances did not incur liability-creating possibilities. But it is quite another thing to say that, because the anchorage first taken, out of necessity, would not have furnished a basis of liability, the ship may thereafter lift anchor and maneuver about in the channel, while still obscured by fog, in the hope of finding a supposed better anchorage and then, because of the fog, anchor in the channel without knowledge of her position and in a manner so as to prevent or obstruct the passage of other vessels or craft, and still not be subject to a charge of negligence. To so hold would be to impose a hazard upon navigation which no decided case has yet done and which we do not think would comport with the intendment of the law. See Act of March 3, 1899, c. 425 § 15, 30 Stat. 1152, 33 U. S. C. A. 409" (R. 115-116).

In view of these facts, we submit that the decision of the Circuit Court of Appeals was not in any sense a violation of accepted interpretations of the Act of March 3, 1899.

THE PETITION FOR CERTIORARI WAS GRANTED BECAUSE OF AN ALLEGED CONFLICT AMONG THE CIRCUITS. SINCE NO SUCH CONFLICT APPEARS THE PETITION SHOULD BE DISMISSED.

As stated in the opinion, this Court—

> "granted certiorari because of *an alleged conflict*

among the Circuits as to the proper interpretation to be given this Act" (emphasis ours, Opinion, pp. 1-2).

No conflict in the interpretation of the Act among the Circuits has appeared upon the argument or in the discussion of this case. The decision of this case involves solely a question of fact as to whether under the circumstances and conditions the master of the "Bohemian Club" was justified in shifting the position of his vessel from a safe anchorage to one which obstructed traffic which was known to be moving at the time, and consequently whether the defense of necessity is open to him in respect to his violation of the express provisions of Section 15 of the Act of March 3, 1899.

Since the "alleged conflict among the Circuits" failed to appear upon the argument and consideration of this case, we submit that the petition for certiorari in any event should be dismissed.

WHEREFORE, the respondent, A. P. Moller, claimant of the motorvessel "Laura Maersk", respectfully prays that this petition for a rehearing be granted, and that upon further consideration the judgment of the Circuit Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

A. P. MOLLER, Respondent,
Claimant of the Motorvessel
"Laura Maersk",
By LEONARD J. MATTESON,
Counsel.

J. HARRY LA BRUM,
LEONARD J. MATTESON,
Counsel for Respondent.

Certificate of Counsel.

I, Leonard J. Matteson, counsel for the above named petitioner, do hereby certify that the foregoing petition and application is presented in good faith and not for delay.

LEONARD J. MATTESON,
Counsel for Respondent, A. P. Moller,
Claimant of the Motor Vessel "Laura Maersk".

p. 3.

SUPREME COURT OF THE UNITED STATES.

No. 56.—October Term, 1943.

The Atlantic Refining Company, Owner of the Tank Steamship "Bohemian Club", Petitioner, *vs.* A. P. Moller, Claimant of the Motor-Vessel "Laura Maersk".	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[December 20, 1943.]

Mr. Justice Black delivered the opinion of the Court.

While lying at anchor in the channel of the Delaware River the tanker "Bohemian Club", owned by the petitioner, was struck by the motor vessel "Laura Maersk", owned by the respondent. Damage to each vessel resulted, for which the respective owners sought recovery in this admiralty proceeding. The District Court found that the collision was caused by the excessive rate of speed at which the "Laura Maersk" was proceeding down the channel, rendered judgment for the full amount of damages inflicted upon the "Bohemian Club", and dismissed the cross-libel of respondent against the "Bohemian Club." The Circuit Court of Appeals approved the District Court's finding that the "Laura Maersk" was negligent but concluded, with one judge dissenting, that the "Bohemian Club" was also negligent, and reversed with directions that the rule of divided damages be applied. See *The Schooner Catharine* v. *Dickinson*, 58 U. S. 170, 177-178; *The "North Star"*, 106 U. S. 17, 20. The Circuit Court's conclusion that the "Bohemian Club" was negligent rested upon its interpretation of the following portion of Section 15 of an Act of March 3, 1899: "It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft."[1] We granted certiorari

[1] 30 Stat. 1152; U. S. C. Title 33, § 409. The Act imposes penal sanctions for violations of Section 15. See §§ 16-18. However this Section has been interpreted as establishing a standard of care applicable in ordinary negligence actions for damages. See Otto Marmet Coal and M. Co. v. Fieger-Austin Dredging Company, 259 F. 435; The William C. Atwater, 110 F. 2d 644; The Southern Cross, 93 F. 2d 297.

because of an alleged conflict among the circuits as to the proper interpretation to be given this Act.[2]

The findings of both courts show that the accident happened under the following circumstances. At about 7:30 A.M. the "Bohemian Club", 435 feet long, was proceeding northward on the east side of the channel of the Delaware River when she encountered a dense fog. Unable to move without endangering herself and other vessels, and unable to obtain anchorage within a distance of five miles, she dropped anchor along her course in the channel. At this point the channel was approximately 1200 feet wide, and northbound vessels were required to use the 400 feet adjacent to the channel's eastern boundary. Under the circumstances, the safest course of conduct for the "Bohemian Club" was to anchor where it did. About 10 A.M. the fog lifted slightly and the Master discovered a large steel buoy about 150 feet to the northeast of the vessel. The tide was then ebb, and was flowing away from the buoy, but was due to change to flood shortly. Fearing that this change might cause the vessel to foul the buoy, the Master had the anchor lifted, the engines put slow ahead, and the rudder put hard right. In less than five minutes, however, the fog again dropped, and the vessel was again anchored. This time, apparently because she had been carried by the tide, the "Bohemian Club" lay somewhat south and west of her original position so that she partially obstructed the western part of the channel used by southbound vessels. There was, however, ample room in the western part of the channel for a southbound vessel to pass the "Bohemian Club"; in fact, since the western part of the channel was twice as wide as the eastern part, there was more space for southbound vessels to pass than there had been for northbound vessels to pass when the "Bohemian Club" was anchored in the eastern part of the channel. There are no findings that the Master of the "Bohemian Club" had any reason to believe that his vessel constituted a more dangerous obstruction to river traffic in general[3] in

[2] See, for example, The City of Norfolk, 266 F. 641; The A. P. Skidmore, 115 F. 791; The Socony No. 9, 74 F. 2d 233.

[3] The opinion of the Circuit Court emphasizes the fact that the "Bohemian Club" did not obstruct southbound traffic in her first position but did obstruct this traffic in her second position. Since, however, the "Bohemian Club" obstructed the northbound traffic in her first position, this fact could not be material unless there was evidence that her Master should have anticipated that the volume of southbound traffic would be heavier than that of northbound traffic. No finding on this question is disclosed by the record.

her second position than in her original position. In compliance with the statutory requirement imposed on vessels which are compelled to anchor in the fog, the "Bohemian Club's" fog bell was rung rapidly for five seconds at minute intervals;[4] and, in addition, lookouts were stationed on the bridge and forecastle. Despite these precautions the "Laura Maersk", southbound at what both courts agreed was an unreasonable speed, crashed into the "Bohemian Club" about fifteen minutes after she anchored the second time.

The question for decision is whether the Circuit Court correctly held that the action of the "Bohemian Club" in anchoring in the channel at the point of the collision was unlawful under Section 15 of the Act of March 3, 1899. The command of Section 15 forbidding vessels to "anchor . . . in navigable channels" has uniformly been interpreted not to be absolute.[5] An exception to the duty required by this section has been recognized where literal compliance with its terms would create a danger to navigation which could be avoided or reduced by violation of its terms. See *The Socony No. 9*, 74 F. 2d 233, 234. As a practical matter an opposite construction would defeat the plain purpose of Section 15 to maintain and promote the safety of navigation. It would, in addition, be out of harmony with Article 27 of the general Navigation Rules for Harbors, Rivers, and Inland Waters, which requires that "in obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the . . . rules necessary in order to avoid immediate danger."[6] Cf. *The Cayuga*, 81 U. S. 270, 275, 276. Furthermore Article 15 of these general Rules, above referred to, contemplated that under some circumstances vessels may be compelled to anchor in foggy weather, and prescribed sound signals which vessels so anchored must use.

In the instant case the Circuit Court of Appeals recognized that the duty imposed by Section 15 is not absolute and held that, under the circumstances, the act of the "Bohemian Club" in anchoring on the east side of the channel was lawful. The Court

[4] Article 15, Navigation Rules for Harbors, Rivers, and Inland Waters; 30 Stat. 99; U. S. C. Title 33, § 191(2)(d).

[5] The Europe, 190 F. 475, 479; The Caldy, 153 F. 837, 840; see also the cases cited in note 2, *supra*.

[6] 30 Stat. 102, U. S. C. Title 33, § 212.

felt compelled, however, to hold that the act of anchoring on the west side was unlawful under Section 15. We think this section does not require such a holding. Whether anchored on the east or the west side of the channel the "Bohemian Club" would, within the literal terms of the section, "obstruct the passage of other vessels." The District Court found that when the fog enveloped the "Bohemian Club" for the second time, "the least dangerous course" was to anchor on the west side of the channel; and this finding was not disturbed by the Circuit Court. Under a proper construction of Section 15, therefore, the circumstances which necessitated both the first and second anchorings of the "Bohemian Club" were equally sufficient to warrant an exception to the duty which it requires. Whether the act of lifting anchor and moving to the western part of the channel to avoid the danger of the buoy constituted negligence is a question wholly outside Section 15. Since the holding of the Circuit Court rested upon an erroneous interpretation and application of this section, its judgment must be reversed.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.